No. 83-172

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

COURT HOUSE PLAZA COMPANY,

Petitioner,

v.

CITY OF PALO ALTO, ET AL.,

Respondents

On Petition From The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JEFFREY P. WIDMAN
SIMS & WIDMAN
Crocker Plaza
Suite 660
84 W. Santa Clara
San Jose, California 95115
Tel.:(408) 998-3400

Attorneys for Plaintiff and Petitioner

August 1983

QUESTIONS PRESENTED

1. Whether the doctrine of *res judicata* (claim-preclusion) should apply in an action for damages under 42 U.S.C. § 1983 after plaintiff has litigated only claims for equitable relief in state courts and governing state law did not recognize plaintiff's right to recover damages for inverse condemnation under the Fifth Amendment.

2. Should this Court now resolve the division among the circuit courts of appeals on the application of *res judicata* under 42 U.S.C. § 1983?

PARTIES: INDIVIDUAL RESPONDENTS

The individual parties not named as Defendants and Respondants in the caption of this Petition for Writ of Certiorari are STANLEY R. NORTON, BYRON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEARS, Councilmen PETER R. CARPENTER, MARY GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL, ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney and LOUIS B. GREEN, Assistant City Attorney.

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES CITED

Federal Cases

California Cases

TABLE OF AUTHORITIES (Continued)

CONSTITUTIONS

STATUTES

OTHER

JURISDICTIONAL GROUNDS

Petitioner's complaint in the district court alleged jurisdiction under 28 U.S.C. § 1331 based upon alleged violations of the Fifth and Fourteenth Amendments to the Constitution of the United States. In addition, the complaint alleged jurisdiction under § 1343 based upon alleged violations of the federal Civil Rights Act, 42 U.S.C. §§ 1981 and following. (See Appendix C.)

Respondents filed a motion to dismiss under FRCP, Rule 12(b), on the ground of *res judicata* and others. The district court granted the motion on June 4, 1982. (See Appendix A.) The district court's Order dismissing the complaint expressed its view that the decision of the Ninth Circuit in *Scoggin v. Schrunk*, 522 F.2d 436 (1975), *cert. denied*, 423 U.S. 1066 (1976), made *res judicata* applicable to all claims stated in Petitioner's complaint. Accordingly, the district court rendered judgment against Petitioner on June 4, 1982. Entry of judgment occurred on June 11, 1982 (Appendix A).

On July 6, 1982, Petitioner filed its notice of appeal to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the judgment below in a memorandum decision and judgment entered on May 2, 1983 (Appendix B). On June 2, 1983, the Ninth Circuit issued its mandate to the district court (Appendix B).

This Court has jurisdiction of this Petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment V.
2. United States Constitution, Amendment XIV, Sections 1 and 5.
3. 28 U.S.C. § 1738.
4. 42 U.S.C. § 1981.
5. 42 U.S.C. § 1982.
6. 42 U.S.C. § 1983.

The text of these constitutional and statutory provisions appears in Appendix C.

STATEMENT OF THE CASE

The district court dismissed the complaint because it believed that an earlier state-court suit for mandamus (the "Mandamus") precluded any subsequent action for damages under 42 U.S.C. § 1983. The Mandamus was the subject of a reported opinion by the California Court of Appeal, First District. *Court House Plaza Company v. City of Palo Alto*, 117 Cal.App.3d 871, 173 Cal.Rptr. 161 (1981). This Court denied review of that state appellate decision. *Court House Plaza Company v. City of Palo Alto, et al.*, No. 81-404, 454 U.S. 1074, *cert. denied* (November 30, 1981). Petitioner filed the complaint in this case before receiving this Court's order denying certiorari.

The complaint alleged historical facts that had been at issue in the Mandamus as well as ultimate facts concerning a taking of property (Fifth Amendment claims) and damages that had not been litigated in the Mandamus. (The parties were substantially the same in both the Mandamus and the subsequent federal action.)

The facts alleged in the complaint were essentially these:

On December 28, 1964 the City adopted a planned development zoning (the "P-C Ordinance") allowing professional and commercial office space use on Petitioner's property. The P-C Ordiance approved, by incorporation, detailed plans for construction of a ten-story office building. These plans included detailed drawings illustrating the location, elevation, and floor plan of the ten-story building, associated parking garage, and other details of site development such as landscaping. landscaping.

A development schedule formed part of the P-C Ordinance. Under that development schedule, Petitioner was required to start construction of Phase 1, consisting of the first four stories of the building and certain levels of the parking garage, within two years after the City's approval of the P-C Ordinance. By October 31, 1976 Petitioner was to commence construction of the remaining six stories of the building as well as additional

levels of the parking garage. In agreeing upon this development schedule, Petitioner and the City understood that phasing would enable Petitioner to coordinate completion of the ten-story building in accordance with the growth in demand for commercial office space in the City.

Petitioner began and completed the first four floors of the building in Phase 1 by August of 1967. In doing so, Petitioner actually commenced construction of Phase 2 physically. The portion of the office building completed in 1967 incorporated a foundation, structural steel, specially located heating and cooling equipment, elevator shafts, an interior smoke-proof tower, and oversized utility systems, all designed to accommodate the remaining six stories in Phase 2.

By early 1970, Petitioner had actually obtained building and use permits for completing the work on Phase 2. Petitioner had also fabricated the additional structural steel and two additional elevators in reasonable reliance upon the issuance of those permits. Petitioner made other investments in the reasonable expectation that Phase 2 would be completed.

The City and its officials committed numerous acts having one characteristic in common: intentional interference with Petitioner's efforts to complete Phase 2 under lawfully issued building and use permits before expiration of the development schedule. Perhaps most significant in terms of the City's policy was the adoption of an ordinance in 1973 limiting the height of new structures to a maximum of 50 feet in all but P-C zones. Improper and retroactive application of the height ordinance to the plans approved within the P-C Ordinance prevented completion of the ten stories in Phase 2. Indeed, the four-story building completed in 1967 itself exceeded the 50-foot limit by several feet.

After suffering numerous delays caused by obstructive acts of the City and its officials, Petitioner applied for an extension of the development schedule in August of 1976, three months before the schedule would expire. At all relevant times Section

18.68 of the City's Municipal Code provided that the Planning Commission could recommend an extension "for good cause shown by the property owner in writing."

In practice, the City had routinely granted such extensions upon application. Based upon a letter written on May 23, 1968 by the City Attorney, Petitioner reasonably expected that it could also obtain such an extension upon a showing of "good cause." But the Planning Commission refused to recommend, and upon appeal the City Council denied, any extension. This denial violated Petitioner's property rights, because Petitioner possessed "good cause" for an extension based not only upon economic circumstances that rendered completion of Phase 2 before October 31, 1976 infeasible, but also upon the dilatory and obstructive acts by the City that had prevented Petitioner from obtaining new building and use permits replacing identical but expired permits for Phase 2.

As a foundation for its claims for damages, Petitioner alleged, in addition to repeated investments in Phase 2 of the Project, the reasonableness of its expectations that Phase 2 could be completed as contemplated by the P-C Ordinance, and conduct by defendants that induced Petitioner to continue investing time and money in the Project.

The complaint cast these allegations in six claims for relief: First, inverse condemnation of Petitioner's property under the Fifth and Fourteenth Amendments; second, inverse condemnation under the California Constitution, Article 1 § 19; third, denial of equal protection and due process of law under the Fourteenth Amendment; fourth, denial of equal protection and due process of law under the California Constitution, Article 1 § 7; fifth, violations of sections 1981 and following of Title 42, U.S.C. (the "Civil Rights Act"), and sixth, declaratory relief.

The prayer for damages sought compensation for (a) Petitioner's historical investment in the property; (b) loss of time and profits, past and future, from the office building; (c) loss of future appreciation in the planned ten-story building. In the

alternative, the prayer sought equitable relief (an order allowing completion of the building) and interim damages for the City's taking.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS COURT HAS RECENTLY DECIDED THAT PRECLUSION RULES DO NOT AUTOMATICALLY BAR A PLAINTIFF UNDER § 1983 FROM MAINTAINING FEDERAL CLAIMS THAT HE THEORETICALLY COULD HAVE RAISED, BUT ACTUALLY DID NOT RAISE, IN A PRIOR STATE-COURT PROCEEDING.

In *Haring v. Prosise*, 51 U.S.L.W. 4736 (decided June 13, 1983) this Court ruled that a plaintiff in an action under 42 U.S.C. § 1983 could present his Fourth Amendment claims to a federal court, even though he had entered a guilty plea and undergone criminal conviction in a state court without litigating those claims. This Court expressly rejected the contention that the plaintiff (Prosise) "should be barred from litigating an issue that was never raised, argued, or decided, simply because he had an opportunity to raise the issue in a previous proceeding." *Id.* at 4739.

The *Haring* opinion represents this Court's most recent decision on the applicability of preclusion rules under § 1983. The opinion was delivered by an unanimous Court. More importantly, the *Haring* decision was announced after the decision of the Ninth Circuit Court of Appeals in this case became final. The Ninth Circuit entered judgment on May 2, 1983 (App. B) and the mandate issued on June 2, 1983 (App. B).

Haring clearly marked one boundary for the application of claim and issue preclusion in a § 1983 action.* But other boundaries remain to be drawn by this Court.

* Petitioner recognizes the distinction between claim-preclusion (*res judicata*) and issue-preclusion (collateral estoppel). *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4471 (1981). The distinction is not critical in this case, because the courts below applied *res judicata*, the more comprehensive of the two rules.

Haring involved a voluntary plea of guilty in a state criminal prosecution followed by a conviction without trial. There this Court refused to presume that the criminal defendant had enjoyed the opportunity to raise his Fourth Amendment defenses, but had determined unilaterally not to do so.

Now this Court may turn to the important question presented here: the extent to which preclusion rules may apply in a § 1983 action after a state-court civil trial and final judgment in a proceeding for limited equitable relief only. This Petition depicts the natural topography for marking another boundry in the area of preclusion under § 1983.

II. THE CIRCUIT COURTS OF APPEALS HAVE ADOPTED CONFLICTING PRECLUSION RULES UNDER § 1983.

The courts below applied the more restrictive version of the rule on preclusion prevalent among the circuit courts of appeals; namely, that *res judicata* applies to all claims that were actually raised and all claims that might have been raised in an earlier state-court suit. The Ninth Circuit has adhered to that view of preclusion at least since *Scoggin v. Schrunk*, 522 F.2d 436 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

As Justice White noted just last year, in dissenting from the denial of certiorari in *Castorr v. Brundage*, ____U.S.___, 103 S. Ct. 240 (1982), the courts of appeals remain divided on that issue:

> The issue of whether constitutional claims not actually litigated in earlier state proceedings are barred in a subsequent federal suit is of considerable importance to § 1983 litigants and has divided the federal courts of appeal. The First, Fifth, Eighth, Ninth, and Tenth Circuits, and now the Sixth circuit, have held that a § 1983 claimant is precluded by res judicata from relitigating not only the issues which were actually decided in the state proceeding, but also the issues which he might have presented. See *Lovely v. Laliberte*, 498 F.2d 1261 (CA 1), cert. denied, 419 U.S. 1038, 95 S.Ct. 526, 42 L.Ed.2d 316 (1974); *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (CA 5 1976);

Robbins v. Dist. Court, 592 F.2d 1015 (CA 8 1979); *Scoggin v. Schrunk*, 522 F.2d 436 (CA 9 1975), cert. denied, 423 U.S. 1066, 96 S.Ct. 807, 46 L.Ed.2d 657 (1976); *Spence v. Latting*, 512 F.2d 93 (CA 10), cert. denied, 423 U.S. 896, 96 S.Ct. 198, 46 L.Ed.2d 129 (1975). The Second and Third Circuits hold that a litigant is not precluded from asserting later such claims in federal court. See *Lombard v. Board of Ed. of New York City*, 502 F.2d 631 (CA 2 1974), cert. denied, 420 U.S. 976, 95 S.Ct. 1400, 43 L.Ed.2d 656 (1975); *New Jersey Ed. Ass'n. v. Burke*, 579 F.2d 764 (CA 3), cert. denied, 439 U.S. 894, 99 S.Ct. 252, 58 L.Ed.2d 239 (1978). This conflict -- which has been recognized by petitioner, by respondent, by the court below, and even by this Court, *Allen v. McCurry*, 449 U.S. 90, 97, n. 10, 101 S.Ct. 411, 416, n. 10, 66 L.Ed.2d 308 (1980) -- should now be resolved. I would grant certiorari.

While *Haring* rejected the Ninth Circuit's view in the context of a criminal plea of guilty without trial, as to other kinds of prior state-court proceedings, not only does this Court's position remain unknown, but the division among the circuit courts of appeals persists and threatens to grow deeper.

Indeed, the courts of appeals may well perceive conflicting signals emanating from this Court. To begin with, this Court has stated repeatedly that it has yet to address the validity of the less restrictive rule on preclusion; that is, that a plaintiff under §1983 may relitigate in federal court all issues except those actually raised and decided in the earlier state-court proceeding. This is apparently the view of the Second and Third Circuits. *E.g., Williams v. Codd*, 459 F.Supp. 804, 812 (S.D.N.Y. 1978) ("The doctrine of *res judicata* does apply to civil rights cases in general, of course, but in a somewhat relaxed form.")

In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court discussed generally the rules on claim and issue preclusion under § 1983, but without ever ruling on the Second and Third Circuits' interpretation:

> A very few courts have suggested that the normal rules of claim preclusion should not apply in §1983 suits in one

> peculiar circumstance: Where a §1983 plaintiff seeks to litigate in federal court a federal issue which he would have raised but did not raise in an earlier state-court suit against the same adverse party. *Graves v. Olgiati*, 550 F. 2d 1327 (CA2 1977). *Lombard v. Board of Ed. of New York City*, 502 F.2d 631 (CA2 1974); *Mack v. Florida Bd. of Dentistry*, 430 F.2d 862 (CA5 1970). These cases present a narrow question not now before us and we intimate no view as to whether they were correctly decided.

449 U.S. 90, 97 n. 10.

Again, in *Haring*, this Court expressly refrained from addressing that question:

> Other federal courts have concluded, however, that civil rights plaintiffs are not barred from litigating issues that could have been raised in prior proceedings in state court on a different cause of action. *See e.g., New Jersey Ed. Assn. v. Burke*, 579 F.2d 764, 772-774 (CA3 1978); *Lombard v. Board of Education*, 502 F.2d 631 635-637 (CA2 1974). Since no motion to suppress evidence on Fourth Amendment grounds was ever raised at the state-court proceedings, this case does not present questions as to the scope of collateral estoppel with respect to particular issues that were litigated and decided at a criminal trial in state court. As we did in *Allen v. McCurry*, 449 U.S. 90, 93 n. 2 (1980), we now leave those questions to another day.

51 U.S.L.W. 4736, 4737 n. 2.

That precise question still remains open. In addition, the direction of this Court's decisions on preclusion under §1983 remains uncertain. *Haring* itself points towards the need to limit the range of preclusion rules in actions under § 1983. *Allen v. McCurry*, in contrast, pointed towards broadening the applicability of those same rules; for there this Court stressed that nothing in the legislative history and purpose of §1983 made preclusion rules generally inapplicable. 449 U.S. 90, 96-97, 104-5.

The lower federal courts have taken *Allen* as encouragement to apply those rules liberally. Even a district court within the

Second Circuit interpreted *Allen* as an invitation to apply *res judicata* freely to federal constitutional claims, whether or not brought under § 1983:

> According to *Monroe v. Pape*, Congress intended in § 1983 to provide a supplementary remedy where state law and process did not allow full and fair litigation of a constitutional claim. But the court in *Allen* recognized that this was in accord with the normal res judicata and collateral estoppel rules, which require a full and fair opportunity to litigate the claim or issue in the first action as a predicate to a bar in the second action.
>
> Thus, the Supreme Court in *Allen* has taken the strongest possible view in favor of full application of res judicata and collateral esoppel rules in §1983 cases. The normal res judicata rule includes a bar against assertion in a second action of an issue which could have been litigated in the first action, but was not. The view that the latter rule does not apply in §1983 cases is wholly inconsistent with the teachings of *Allen*.[1]
>
> As noted earlier, the present case is not brought under § 1983, but directly under the Fifth and Fourteenth Amendments. The Second Circuit in *Lombard* left open the question of whether a federal court action brought directly under the Constitution would be barred by a prior claim could have been litigated but was not. 502 F.2d at 637. In view of *Allen v. McCurry*, it seems clear that, at the very least, one must read the *Lombard* holding narrowly, and should not expand it beyond its precise facts. Thus, the answer to the question left open in *Lombard* is that res judicata should apply. The result in the present case is that plaintiff's claim is barred.

Sachetti v. Blair 536 F.Supp. 636, 640-41 (S.D.N.Y. 1982). Indeed, in a footnote the *Sachetti* court portrayed the Second Circuit's view as isolated and possibly incorrect after *Allen*. *See also, Harrington v. Inhabitants of Town of Garland, Me.*, 551 F.Supp. 1371, 1373-75 (D.Me. 1982) (noting the uncertainty created by the question left open in *Allen v. McCurry*).

Nor does this Court's opinion in *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 102 S. Ct. 1883 (1982),

help remove the false impression that preclusion rules are settled in §1983 actions. *Kremer*, of course, was a Title VII case. *Kremer* rested upon the legislative history of 42 U.S.C. §§2000e and following and their relation to 28 U.S.C. § 1738. Yet there this Court held that a Title VII plaintiff would be precluded from suing in federal court if the earlier state proceedings did "no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause" and the plaintiff had enjoyed a "full and fair opportunity to litigate" his claim of employment discrimination. 456 U.S. 461, 102, S. Ct. 1883, 1897.

If receiving a minimum of due process sufficed to trigger preclusion under Title VII, then why would not a very small measure of due process produce a similar result under §1983? True, the *Kremer* opinion suggested, in *dictum*, that preclusion under §1983 might apply under stricter constitutional requirements:

> Our finding that Title VII did not create an exception to §1738 is strongly suggested if not compelled by our recent decision in *Allen v. McCurry*, *supra*, that preclusion rules apply in §1983 actions and may bar federal courts from freshly deciding constitutional claims previously litigated in state courts. Indeed, there is more in §1983 to suggest an implied repeal of §1738 than we have found in Title VII.

456 U.S. 461, 476.

But the holding of *Kremer* reflected this Court's apparent movement toward expanding the scope of preclusion rules.

Repeated, indeed universal, concern over the federal caseload gives the lower federal courts a practical reason to read *Allen* and *Kremer* in that manner. *But compare Consolidated Foods Corporation v. Unger*, ___U.S.__, 102 S. Ct. 2288 (1982) (Blackmun, J., concurring) (concern that *Kremer* will not serve Congress' purpose in enacting Title VII and may even encourage claimants *not* to seek redress first in state agencies and courts).

Now *Haring* has made it evident that this Court does not intend to sanction any broad, virtually automatic rule of preclusion in § 1983 actions. Therefore, this Court should now address the correctness of the Ninth Circuit's view, as applied in this case, that an earlier state-court suit for equitable relief bars a subsequent action for damages under § 1983, simply because the plaintiff, 'could have' sought damages in the state court, notwithstanding the constitutional inadequacy of the remedy made available by the state court.

III. PETITIONER DID NOT ENJOY A "FULL AND FAIR OPPORTUNITY" TO MAINTAIN ITS CONSTITUTIONAL CLAIMS FOR DAMAGES IN STATE COURT BECAUSE THE CALIFORNIA COURTS REQUIRED INITIAL RESORT TO EQUITABLE REMEDIES AND ULTIMATELY ELIMINATED ANY MONETARY REMEDY ALTOGETHER.

In this case Petitioner admittedly went to trial in a California court in the Mandamus (to obtain extension of the development schedule and permits) and then appealed unsuccessfully. On this ground, the courts below concluded that, Petitioner either fully litigated its constitutional claims in the Mandamus or at least had an opportunity to do so but declined.

Unfortunately, this facile conclusion ignores historical reality—in particular, the evolution of California law during the period from 1977 through 1981 when Mandamus was pending.

That hard reality, already familiar to this Court from the cases cited below, brings Petitioner now within the established exceptions to preclusion under § 1983.

The two chief exceptions are stated in the *Haring* opinion; and both operate in this case in tandem:

> Section 28 U. S. C. sec. 1738 generally requires "federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.; *Allen v. McCurry, supra,*

at 96.[6] In federal actions, including sec. 1983 actions, a state-court judgment will not be given collateral estoppel effect, however, where "the party against who an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Id.*, at 101[7] Moreover, additional exceptions to collateral estoppel may be warranted in sec. 1983 actions in light of the "understanding of sec. 1983" that "the federal courts could step in where the state courts were unable or unwilling to protect federal rights." *Id.*, at 101. Cf. *id.*, at 95, n. 7; *Board of Regents v. Tomanio*, 446 U.S. 478, 485-486 (1980) (42 U.S.C. sec. 1988 authorizes federal courts, in an action under sec. 1983, to disregard an otherwise applicable state rule of law if the state law is inconsistent with the federal policy underlying sec. 1983).

51 U.S.L.W. 4736, 4738.

In this case Petitioner could not have effectively litigated its federal constitutional claims for damages in state court, precisely because the California courts in 1977 favored initial resort to equitable remedies (*i.e.* mandamus or declaratory relief) and by 1979 the California Supreme Court had expressly eliminated the monetary remedy for a regulatory taking under the Fifth Amendment. *See Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25, 157 Cal.Rptr. 372 (1979), *aff'd.*, 447 U.S. 255 (1980) (challenged zoning ordinance, held constitutional on its face; no opinion expressed on requirement of a monetary remedy under the Fifth Amendment).

The historical antecedents of the California high court's opinion in *Agins* are summarized in the opinion itself. 24 Cal. 3d 266, 273-77, 157 Cal.Rptr. 372, 375-77. In brief, the California court in 1975 began by expressing a preference for equitable suits in disputes over land-use regulations (zoning ordinances and general plans, typically). *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508, 542 P.2d 237, 125 Cal.Rptr. 365, *cert. denied* 425 U.S. 904 (1976). At the same time the *HFH* court restricted the scope of regulatory 'takings' to those cases in which the challenged regulation deprived the owner of virtu-

ally all reasonable use of his land. *HFH, Ltd., supra,* at 15 Cal. 3d 518 n. 16. During the years succeeding that decision, the California appellate courts almost invariably ruled against the landowner in actions for inverse-condemnation damages. *E.g., Brown v. City of Fremont,* 75 Cal.App.3d 141, 142 Cal.Rptr. 575 (1976) (cause of action for inverse condemnation stated where City's rezoning deprived owner of any economically viable use and may have served as an alternative to public acquisition for park use). Finally, in 1979 the California Supreme Court in *Agins* not only stated that the California courts may not award monetary damages under the Fifth Amendment in land-regulation cases, but also expressly disapproved *Eldridge* as inconsistent with that radical rule. 24 Cal.App.3d 266, 273, 157 Cal.Rptr. 372, 375, 598 P.2d 25.

It was during that epoch that Petitioner prosecuted the Mandamus in the California courts. The Mandamus sought only equitable relief – essentially an order requiring the City to extend the development schedule and issue replacement use and building permits in order to complete the ten-story building originally approved. Petitioner argued that it held a "vested right" to complete the building, because such an allegation was required under California law to obtain *de novo* review of an agency's decision through mandamus. The determination on "vested right" in the Mandamus affected a preliminary procedural matter, not any substantive issue necessary to the decision. Cal. Code of Civ. Proc. §§1085, 1094.5; *Strumsky v. San Diego County Employees Retirement Association,* 11 Cal.3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (*de novo* review "under independent judgment" test applies in proceeding under C.C.P. § 1094.5 for administrative mandamus where a fundamental, vested right stands at issue). Petitioner sought no money in the Mandamus. Nor did Petitioner attempt to establish those facts requisite to a cause of action for inverse condemnation: the lack of any remaining, economically viable use for the property taken, acquisitory intent on the part of the City, the existence and extent of injury to the real property.

See generally, Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) and *Kaiser-Aetna v. U.S.*, 444 U.S. 164 (1979).

In light of this disquieting chronicle of California land-use law and Petitioner's enforced compliance with the procedural and substantive aspects of that law, this Court should conclude that the exceptions noted in *Haring* do cover this case. For if those exceptions do not control here, then the strong federal policies behind §1983 may have lost their original force and direction. The commentators on §1983 have observed that the scope of the "full and fair opportunity" exception remains somewhat "ambiguous" still, and so this Court has yet another reason to grant this Petition. Wright, Miller & Cooper, (1981) Federal Practice and Procedure: Juristicton § 4471, at p. 708 (1981).

Clearly this is a case in which the California courts have refused to afford Petitioner the right to seek monetary damages under the Fifth and Fourteenth Amendments, while the lower federal courts, in a subsequent § 1983 action, have effectively blessed the dereliction of the state courts.

The decision of the California Supreme Court in *Agins, supra*, does not comport with the requirements of the Fifth Amendment regarding the availability of a monetary remedy. In his dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 101 S. Ct. 1287, Justice Brennan reasoned the Fifth Amendment mandates the availability of monetary damages for a taking. Justice Rehnquist would have agreed with that view in the dissenting opinion. 450 U.S. 621, 636 (Rehnquist, J., concurring in the dismissal for lack of a final judgment below). It is now generally recognized that a majority of this Court probably disagrees with the California high court's view of remedies under the Fifth Amendment.

Ironically, the Ninth Circuit stands among the first of the courts of appeals to read the opinions in *San Diego Gas &*

Electric as disapproval of *Agins*. In reversing a summary judgment against a landowner suing a city and water district in California for damages under § 1983, the Ninth Circuit refused to follow *Agins* on the question of remedy because ". . . the present vitality of this aspect of Agins has . . . been substantially undercut by Justice Brennan's dissenting opinion in San Diego Gas & Electric Co. v. City of San Diego, . . ." *Martino v. Santa Clara Valley Water District*, 83 Daily Journal D.A.R. 1067, (April 14, 1983) (No. 81-4578).

The landowner in *Martino* had sought no equitable relief, neither mandamus nor declaratory relief. Therefore the Ninth Circuit might have affirmed the summary judgment on the ground that the landowner had prayed only for damages, and California law on inverse condemnation prohibited an award of damages. The *Martino* court chose to follow this Court's constitutional rulings instead, reasoning:

> Even if we were persuaded by the dictum in *Agins* to hold that the Martinos could not recover damages for inverse condemnation, summary judgment would be improper insofar as it relates to the Martinos' claim under the Federal Civil Rights Act, 42 U.S.C. sec. 1983, 1985 and 1986 . . . are currently in a state of evolving definition and uncertainty" (*See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 246, 256 (1981)), an action for damages under section 1983 for the overregulation of land was recognized by the U.S. Supreme Court in *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). The district court improperly denied the Martinos an opportunity to try to prove such a claim.

Id. at 1069.

Because California law governing the Mandamus meant that the state courts were either unable or unwilling to protect Petitioner's constitutional right to seek damages, and more likely both, the courts below should not have dismissed Petitioner's § 1983 action on the ground of *res judicata*. *Haring v. Prosise*, *supra*, at 4738.

IV. SINCE THE FINAL JUDGMENT IN THE MANDAMUS, THIS COURT HAS IMPLICITLY DISAPPROVED THE CALIFORNIA HIGH COURT'S OPINION IN *AGINS* ON THE ISSUE OF DAMAGES FOR INVERSE CONDEMNATION, AND THIS CHANGE IN CONTROLLING LAW MAKES PRECLUSION INAPPLICABLE TO PETITIONER'S ACTION UNDER § 1983.

Having recounted the rise and fall of the California rule in *Agins*, Petitioner now submits that those drastic changes in governing constitutional law afford yet another exception to the preclusion rules.

This Court explained this exception in its *Haring* opinion:

> We have recognized various other conditions that must also be satisfied before giving preclusive effect to a state-court judgment. See generally *Montana v. United States*, 440 U.S. 147 (1979). For example, collateral estoppel effect is not appropriate when "controlling facts or legal principles have changed significantly since the state-court judgment," *id.*, at 155, or when "special circumstances warrant an excention [sic] to the normal rules of preclusion," *Montana v. United States, supra*, at 155; see, *e.g.*, *Porter and Dietsche, Inc. v. FTC*, 605 F. 2d 294, 300 (CA7 1979); cf. *Montana v. United States, supra*, at 163 (preclusive effect to a state-court judgment may be inappropriate when the sec. 1983 claimant has not " 'freely and without reservation submit(ted) his federal claims for decision by the state courts . . . and ha(d) them decided there . . .' ") (quoting *England v. Medical Examiners*, 375 U.S. 411, 419 (1964)).

51 U.S.L.W. 4736, 4738 n.7

Not until after the final judgment of the California Court of Appeal in the Mandamus did Petitioner become free of the restriction on monetary damages, and an unconstitutional restriction at that, existing under California law. This Court announced its decision in *San Diego Gas & Electric Co., supra*, on March 24, 1981, thirteen days after the decision by the California Court of Appeal. Petitioner commenced its action for damages under § 1983 on December 3, 1981.

Unless the judgment below is reversed, Petitioner will never have an opportunity to present its claim for damages to any court disposed to recognize and to rule fairly on such a claim.

V. THE POLICY BEHIND § 1983, TO ASSURE THE FEDERAL FORUM FOR VINDICATION OF CONSTITUTIONAL RIGHTS, WILL BEST BE SERVED BY THIS COURT'S ISSUING ITS WRIT.

This Court has repeatedly recognized the purposes served by § 1983. In essence, the statute embodies a policy that the federal courts remain available to litigants seeking redress for violation of their constitutional rights. That policy takes on compelling force in those cases where the state courts have proven deficient in protecting such rights. *Haring v. Prosise*, 51 U.S.L.W. 4736, 4741; *accord*, *Allen v. McCurry*, 449 U.S. 90, 100-1 (1980). As this Court succinctly explained in *Allen*:

> To the extent that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of § 1983 in *Monroe v. Pape*, *supra*, the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. 365 U.S., at 173-174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. *Id.*, at 176. This understanding of § 1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim.

449 U.S. 100, 101.

Here the California courts in practice ignored, and ultimately disavowed, Petitioner's right to seek monetary damages for an alleged taking of property under the Fifth Amendment. Nothing in *Allen v. McCurry* or in any of this Court's other decisions on the preclusion rules authorizes the decision by the Ninth Circuit here.

Other policies, Petitioner recognizes, impinge upon the question of preclusion under § 1983. There are, for example, considerations of comity and federalism and the express mandate of full faith-and-credit for state-court judgments under 28 U.S.C. § 1738. In addition, limited federal judicial resources may cause this Court to incline towards giving greater scope to preclusion rules.

Reconciling all of these competing interests does not present an easy task. *See generally*, Note, "Res Judicata and Section 1983: The Effect of State Court Judgments on Federal Civil Rights Action," 27 *UCLA L. Rev.* 177 (1977). In the final analysis, the creation of a universal rule on preclusion under § 1983 may not prove a manageable or desirable enterprise.

Yet more modest, but extremely important, goals lie within this Court's reach. The division among the circuit courts of appeals on preclusion rules can be healed definitively. In addition, this Court can clearly announce in this case that a civil action for damages under § 1983 can be maintained after an earlier state-court suit that confined the plaintiff to a single, constitutionally inadequate, equitable remedy. Finally, this Court may rule that, in land-regulation cases such as this where the need for finality is not great, where in reality the land remains frozen and the City adamant in its denial of the owner's rights, the doctrine of *res judicata* will display a narrower sweep.

Cf. Castorr v. Brundage, U.S. , 103 S.Ct. 240, 241 (Stevens, J., concurring in denial of certiorari).

This court should issue its writ in this case as one that sharply poses an important set of related questions under § 1983 and the Fifth and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
On July 31, 1983

SIMS & WIDMAN

/s/ Jeffrey P. Widman
JEFFREY P. WIDMAN
84 W. Santa Clara St.
San Jose, CA 95115
Telephone: (408) 998-3400

Attorneys for Petitioner

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

Jeffrey P. Widman, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for Petitioner in this cause; that on this 1st day of August, 1983, he mailed three copies of Petitioner's Petition for a Writ of Certiorari in this cause by depositing same in the United States mail, first-class postage prepaid, to:

Diane M. Lee
City Attorney
City of Palo Alto
250 Hamilton Ave.
Palo Alto, CA 94301

Fred Caploe
Williams & Caploe
1060 Grant St.,
Suite 201
P.O. Box 698
Benicia, CA 94510

and that he also mailed forty copies of Petitioners' Petition for a Writ of Certiorari to the Clerk of this Court, first-class postage prepaid, all in compliance with Supreme Court Rule 28.

/s/ Jeffrey P. Widman
JEFFREY P. WIDMAN

SUBSCRIBED AND SWORN to before me this 31st day of July, 1983.

Witness my hand and official seal.

/s/ A.B. Drexler
A.B. DREXLER
NOTARY PUBLIC

My commission expires 7-15-86

APPENDICES

TABLE OF CONTENTS

APPENDIX A

(1) Complaint for Inverse Condemnation, Deprivation of Constitutional Rights and Violation of the Federal Civil Rights Act and Declaratory Relief in the United States District Court for the Northern District Court of California filed on December 3, 1981.

(2) Order Granting Motion to Dismiss of the United States District Court for the Northern District of California filed on June 4, 1982.

(3) Judgment of the United States District Court for the Northern District of California filed on June 4, 1982.

JEFFREY P. WIDMAN
ANDREW L. FABER
BERLINER, COHEN & BIAGINI
99 Almaden Blvd., Suite 400
San Jose, CA 95113
Telephone: (408) 286-5800

ROBERT E. CARTWRIGHT
CARTWRIGHT, SUCHERMAN, SLOBODIN, & FOWLER, INC.
160 Sansome Street, Suite 900
San Francisco, CA 94306
Telephone: (415) 433-0440

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COURT HOUSE PLAZA COMPANY, a limited partnership, v. Plaintiff, THE CITY OF PALO ALTO, a municipal corporation, STANLEY R. NORTON, BYRON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEARS, Councilmen, PETER R. CARPENTER, MARY R. GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney and LOUIS B. GREEN, Assistant City Attorney, Defendants.	No. C-81-4537 SC COMPLAINT FOR INVERSE CONDEMNATION, DEPRIVATION OF CONSTITUTIONAL RIGHTS AND VIOLATION OF THE FEDERAL CIVIL RIGHTS ACT AND DECLARATORY RELIEF [Jury Trial Demanded]

FIRST CLAIM FOR RELIEF

[Inverse Condemnation – United States Constitution]

[Jurisdiction and Venue]

1. This Court has jurisdiction under Section 1331 of Title 28 of the United States Code, because this action arises under the Fifth and Fourteenth Amendments to the Constitution of the United States and, more specifically, those clauses of those Amendments requiring the payment of just compensation to the owner of property taken by government for public use and prohibiting the deprivation of rights without due process of law and the denial of equal protection under the laws.
2. This Court has jurisdiction also under Section 1343 of Title 28 of the United States Code, because this action is brought under Sections 1981 and following of Title 42 of the United States Code (the Civil Rights Act) to redress the deprivation, under color of state law, of Plaintiff's rights, privileges, and immunities secured by the Constitution of the United States and by the Act.
3. To the extent that state law may authorize any claim for relief stated herein, this Court has pendent jurisdiction of such state claims because they arise from the same set of facts as the federal claims stated in this Complaint.
4. Plaintiff, COURT HOUSE PLAZA COMPANY, is a limited partnership formed and existing under the California Limited Partnership Act (Corporations Code §§15500 *et seq.*) Plaintiff does business under the name of COURT HOUSE PLAZA COMPANY and has complied with the provisions of California law (Business and Professions Code §§17910 *et seq.*) for the filing and publication of a certificate stating such fictitious business name. Plaintiff is the successor-in-interest to California Lands Building Company, a California general partnership, the former owner of the property in question here until about October of 1971.

5. Plaintiff's principal place of business, and the property in question are located within, and the acts of Defendants described in this Complaint, all occurred within, the jurisdictional boundaries of the District Court for the Northern District of California. Venue is proper in this Court for the prosecution of this action.

[Parties to this Action]

6. Plaintiff is the fee owner of real property located at 260 Sheridan Avenue, City of Palo Alto, County of Santa Clara, State of California.

7. Defendant, THE CITY OF PALO ALTO ("the CITY"), is now and at all times pertinent to this action was, a municipal corporation organized and existing under the laws of the State of California as a charter city and located in the County of Santa Clara, State of California.

8. Defendents STANLEY R. NORTON, BRYON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN T. BERWALD, ANNE R. WITHERSPOON and JOHN V. BEAHRS were, on and before December 6, 1976, members of the City Council of the CITY.

Defendents PETER H. CARPENTER, MARY GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL and ANNE STEINBERG were, on and before December 6, 1976, members of the Planning Commission of the CITY.

Defendants STANLEY J. NOWICKI, JAMES O. GLANVILLE, NAPHTALI H. KNOX, ROBERT K. BOOTH, JR., and LOUIS B. GREEN were, on or before December 6, 1976, respectively, the Chief Building Inspector, the Zoning Administrator, the Director of Planning and Community Environment, the City Attorney, and the Assistant City Attorney of the CITY.

9. At all times pertinent to this action, Defendants individually and collectively, acted in concert to cause Plaintiff's injury

as described in this Complaint; and the individual Defendants served as the agents and/or employees of Defendant CITY and of each other and at all times acted within the scope of such agency and employment.

[History of the Project: Acquisition of Vested Rights]

10. The CITY adopted Ordinance No. 2224 on December 28, 1964 (the "P-C Ordinance"). The P-C Ordinance placed Plaintiff's property in a "P-C" zone; that is, a zone for professional and commercial office use. The P-C Ordinance also approved (by incorporation) Plaintiff's development plans for ten-story office building; and these plans consisted of detailed drawings showing the location, elevation, and floor plan of the building, the related parking garage, and other details of the site development (the "Project").

11. The P-C Ordinance contained certain conditions:

(a) "Building location, dimensions, heights and other improvements shall be substantially as indicated on the approved Development Plan."

(b) Off-street parking space shall be provided, the number of spaces to be at the ratio of one for each 144 square feet of floor area in the ground floors and one parking space for each 288 square feet of floor space in the upper floors.

(c) The ten-story building shall be built according to a development schedule providing that, in Phase 1, "start of construction of the four-story office building" and the "parking garage" shall be "within two years of Council approval" and, in Phase 2, "start of construction of the fifth to and including the tenth story" and "additional levels of the parking garage" shall be "by October 31, 1976."

The development schedule contained in the P-C Ordinance rested upon an understanding between Plaintiff and City officials that the phasing of the Project would enable

Plaintiff to complete the Project when the demand for office space in the CITY made completion economically feasible.

12. Soon after adoption of the P-C Ordinance Plaintiff prepared architectural plans for the entire ten-story building. On June 14, 1966, the CITY issued a building permit for Phase 1. On January 17, 1966, the CITY issued a use permit for Phase 1. In reliance upon these permits and with the guidance of its architectural plans for the ten-story building, Plaintiff commenced construction of Phase 1, within the two-year period required under the development schedule of the P-C Ordinance, and completed construction in about August of 1967.

13. The first four stories of the building completed in Phase 1 incorporated structural elements designed to support the remaining six stories in Phase 2. Among the structural elements, costing over $450,000, were the following:
    (a) A foundation capable in sustaining all ten floors;
    (b) Structural steel of sufficient strength to support the remaining six floors;
    (c) Heating and cooling equipment placed in the basement instead of upon the roof, in order to permit construction of the remaining six floors without interrupting service to the first four floors;
    (d) Two additional elevator shafts to accommodate elevators for the remaining six floors;
    (e) An interior smokeproof tower for fire safety purposes, not necessary in a four-story building;
    (f) Extra electrical, water and sewage capacity permitting hook-up of facilities on the remaining six floors.

14. In so completing Phase 1 and thereby commencing actual construction of Phase 2, Plaintiff acquired a vested right to complete Phase 2 under regulations in effect on the date that the P-C Ordinance was adopted. Plaintiff reasonably expected that it might complete Phase 2 under such regulations based upon the conduct of Defendants in

issuing building and use permits for commencement of the Project; and the Plaintiff's investment in the Project in 1966 and succeeding years resulted from that reasonable expectation.

[The Parking Problem]

15. Because the parking garage contemplated by the P-C Ordinance would have interfered with the CITY's plan for realignment of Page Mill Road, the CITY did not require Plaintiff to begin construction of the garage within the two years provided in the development schedule. On December 13, 1965 the CITY adopted Resolution No. 3860 requiring Plaintiff to provide 107 off-street parking spaces instead of the garage. The CITY thereby acknowledged its responsibility for impeding Plaintiff's construction of the parking garage and indicated officially its willingness to cooperate with Plaintiff in resolving the parking problem.

16. Thereafter CITY engaged in a course of conduct which effectively aggravated the parking problem, prevented its resolution, thwarted Plaintiff in its efforts to satsify the condition of the P-C Ordinance regarding parking spaces. The CITY's course of conduct included, among others, the following acts:

    (a) The CITY failed to resolve with the County of Santa Clara the design of the Page Mill Road realignment.

    (b) On December 11, 1967, the CITY adopted Resolution No. 4055 extending time for the commencement of construction of the parking garage by one year. On May 6, 1968 the CITY adopted Resolution No. 4113, rescinding Resolutions Nos. 3860 and 4055, substituting 107 attendant parking spaces on the surface in place of a parking garage, and allowing until October 31, 1976, for Plaintiff to commence construction of the parking garage.

(c) By agreement with the County of Santa Clara, the CITY consented to the County's acquiring, under a final order of condemnation entered on August 21, 1970, a portion of the land Plaintiff intended to use for construction of the parking garage, making its construction impossible.

(d) In connection with the foregoing condemnation, the CITY sold the County, and the County conveyed to Plaintiff as partial compensation, a small piece of land supposedly usable for the parking garage, but known to the CITY not to be usable under CITY's own requirements for design and construction.

(e) On March 31, 1975, the CITY resolved to acquire six parcels of land (the "Power parcels") for eventual development by the CITY for low-and moderate-income housing. At the time of this Resolution the CITY knew that Plaintiff had once invested funds in acquiring an option to purchase, and later in purchasing the Power parcels as a means of resolving the parking problem. Although no longer the owner after 1973, Plaintiff remained interested in using the Power parcels for parking for the project.

By these and other acts the CITY defeated Plaintiff's reasonable expectation that the CITY would with Plaintiff cooperate to satisfy the parking requirements for the Project before October 31, 1976.

[City's Dilatory and Arbitrary Administrative Acts]

17. In the Fall of 1968 Plaintiff completed construction drawings for Phase 2. The demand for office space then justified completion of Phase 2. In October of 1969 Plaintiff arranged financing for construction, directed its general contractor to commence the placement of construction subcontracts for the remainder of Phase 2, and particularly for structural steel and elevators for the six-story addition.

18. Plaintiff applied for a building permit on December 1, 1969. Instead of issuing a building permit promptly according to the regulations fixed by the P-C Ordinance, Defendants arbitrarily insisted that the smokeproof tower shown in the construction plans did not comply with the CITY's Building Code as amended after the P-C Ordinance. This dispute between Plaintiff and Defendants was not resolved until after the Assistant City Attorney ruled that Plaintiff had acquired vested rights in a ten-story office building, to be completed with an interior smokeshaft and without a fire sprinkler system, under the P-C Ordinance. The CITY finally issued the building permit on February 16, 1970.

19. Plaintiff applied for a use permit on February 13, 1970. Again Defendants arbitrarily objected to this application on the ground that the ten-story building, when completed, would be fourteen feet higher than the building shown in the drawings incorporated into the P-C Ordinance, even though defendants knew that the P-C Ordinance required building heights to be only "substantially as indicated on the approved Development Plan." The fourteen-foot height difference derived from the need for more space between the floors to accommodate heating and ventilation equipment. The first four floors built in Phase 1 had already included the extra spacing. Because CITY's Zoning Administrator objected to the difference in height, Plaintiff was required to request the CITY's Planning Commission to overrule the Zoning Administrator. On March 30, 1970 the City Council approved the Planning Commission's favorable ruling and issued the use permit, thereby ruling officially that the fourteen-foot height difference substantially complied with the P-C Ordinance.

20. While the CITY so delayed in issuing building and use permits to Plaintiff for the completion of Phase 2, the CITY also approved, on September 22, 1969, the nearby Palo Alto Square Project consisting of two ten-story office

towers competing directly with Plaintiff's Project. The Palo Alto Square Project created a surplus of professional and commercial office space in the vicinity and so rendered the completion of Phase 2 by Plaintiff not viable economically for several years under then-prevailing business and financial conditions.

21. Notwithstanding its own financial difficulties and the saturated market for office space, Plaintiff again applied for a use permit to complete Phase 2, following the expiration of the use permit issued on February 13, 1970. Plaintiff's new application was filed on February 27, 1973 and requested a use permit identical to the one issued in 1970. Despite the fact that the City Council had already declared officially that the fourteen-foot height difference complied substantially with the P-C Ordinance, the CITY's Zoning Administrator indicated his intent to deny the new application because of that difference. In the face of this arbitrary objection, Plaintiff withdrew this application on March 30, 1973.

22. In September of 1973 the CITY adopted an interim Ordinance No. 2745 limiting the height of new structures to fifty feet. The CITY incorporated this fifty-foot height limit into its new comprehensive plan in 1976.

23. In late 1975 the market for professional and commercial office space finally improved. The competitive Palo Alto Square Project was then almost completely leased. The renewed demand for office space and the availability of construction financing combined to render the completion of Phase 2 of the Project economically feasible once again.

24. In September of 1975 Plaintiff renewed discussions with Defendants regarding the completion of Phase 2. In response, Defendants resumed a course of conduct intended to delay Plaintiff, prevent completion of Phase 2, deprive Plaintiff of its vested rights, and to frustrate Plaintiff's reasonable investment-backed expectation

that it could complete the Project under the P-C Ordinance and the regulations in effect when the P-C Ordinance was adopted. Among the acts comprising such course of conduct were the following:

(a) After Plaintiff applied on June 30, 1976 for a change in the P-C zone to resolve the parking problem, the CITY's Zoning Administrator unreasonably objected to such application on the ground that it included land not owned by Plaintiff and for which Plaintiff requested contingent P-C zoning. Consequently, Plaintiff acquired the described land on September 11, 1976. Notwithstanding Plaintiff's expenditures of time, money, and personal efforts the zone-change application was never finally processed by the CITY before October 31, 1976, the end of the development schedule under the P-C Ordinance.

(b) In the face of objections to its zone-change application, Plaintiff applied for a three-year extension of the development schedule on the suggestion of Zoning Administrator. The Planning Commission denied this extension on August 25, 1976, despite the fact that Section 18.68 of the CITY's Municipal Code provides that an extension of a development schedule may be recommended by the Planning Commission "for good cause shown by the property owner in writing." Plaintiff appealed the denial to the City Council, and the Council placed the appeal on its agenda. On the advice by the Mayor of the CITY and other council-members that the appeal would prove too controversial, Plaintiff withdrew the appeal on September 11, 1976.

(c) On August 27, 1976 Plaintiff applies for another use permit for the same ten-story building for which the use permit had been issued in 1970. On August 31, 1976 Plaintiff also applied for a building permit,

submitting the same plans submitted to the CITY in 1969. The City's Zoning Administrator and Building Inspector refused to act on either of these applications, notwithstanding the fact that Plaintiff then possessed a right to obtain the use and building permits described in the applications pursuant to the P-C Ordinance.

(d) After Plaintiff requested on October 1, 1976 a one-year extension of the development schedule, Defendants again sought to impose upon Plaintiff's request regulations adopted after the P-C Ordinance, in particular the California Environmental Quality Act of 1973. On October 27, 1976 the City Council denied the appeal, thereby finally ruling that the development schedule ending on October 31, 1976 would not be extended.

(e) The CITY never issued another building or use permit for completion of Phase 2. The City, in failing to issue such permits, relied upon grounds not authorized by P-C Ordinance but imposed by regulations adopted subsequently thereto.

25. Plaintiff demonstrated, as required by Section 18.68 of CITY's Municipal Code, "good cause" for the one-year extension. Such good cause consisted in the history of the Project described above. As early as May 23, 1968, when the City Attorney wrote to Plaintiff concerning the availability of extensions to a development schedule, Plaintiff formed the reasonable expectation that, because the CITY had in fact customarily granted such extensions to other applicants, Plaintiff would also be granted an extension upon its request for good cause shown.

26. During the course of the history of the Project described above, Plaintiff invested these funds in the Phase 2 of the Project:

(a) $450,000 for the structural elements incorporated in Phase 1 as part of the construction of Phase 2.

(b) More than $65,000 for the preparation of architectural plans for the remaining six stories of the building.

(c) More than $450,000 for the fabrication of structural steel and elevators for the remaining six stories, expended in good faith reliance on the timely processing of Plaintiff's application for a building permit finally issued after delays on February 16, 1970.

(d) More than $20,000 for the preparation of revised plans and specifications to comply with the 1973 Uniform Building Code adopted in Palo Alto, in good-faith effort to compromise with the CITY, and an additional $5,000 or more in legal fees in connection with hearings before the Planning Commission and City Council.

(e) In excess of $10,000 for parking studies and revised parking plans submitted to the Planning Commission.

(f) $20,000 for the purchase of the six Power parcels to solve the parking needs for the ten-story building.

(g) $87,000 for acquisition of the Pierson parcel to overcome the CITY's objection to Plaintiff's zone-change application in September of 1976.

(h) In excess of $160,000 in total for parcels located at 228 Sheridan Avenue, 230 Sheridan Avenue, 320 Sheridan Avenue, and 2660 Park Boulevard, all near the Project, as possible sites for parking.

The above items constitute special damages suffered by Plaintiff as a result of Defendants' preventing completion of Phase 2. Plaintiff has also suffered additional special damages, the full nature and extent of which Plaintiff does not know, but will allege and prove at the appropriate time.

27. In addition, Plaintiff has suffered general damages in amounts not now known, including, but not limited to, the following:

(a) Loss of time by, and inconvenience to, its partners and the partners of its predecessor general partnership.

(b) Loss of profits from the existing four-story building.

(c) Loss of profits from the remaining six stories of the building which Plaintiff has a right to complete.

(d) Loss of increased appreciation in the four-story building and the remaining six stories together with the parking garage as a complete, integrated project.

Plaintiff has also suffered additional general damages, the full nature and extent of which Plaintiff does not know, but will allege and prove at the appropriate time.

28. By their conduct Defendants have appropriated, and taken without payment of just compensation, Plaintiff's property as described in paragraphs 26 and 27 preceding as well as the air-space above the existing four-story building, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

SECOND CLAIM FOR RELIEF

[Inverse Condemnation – California Constitution Art. 1, §19]

29. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations contained in paragraphs 1 through 27, inclusive, of this Complaint.

30. By their conduct Defendants have confiscated, appropriated, and taken without payment of just compensation Plaintiff's property as described in paragraphs 26 and 27 above as well as the air-space above the existing four-story building; and such taking and/or damaging of property violates Article 1, §19 of the Constitution of the State of California.

31. Plaintiff is entitled to recover its reasonable costs, disbursements, and expenses, including attorney's and expert fees, pursuant to Section 1036 of the California Code of Civil Procedure.

THIRD CLAIM FOR RELIEF

[Denial of Equal Protection and Due Process of Law Under the Fourteenth Amendment, U.S. Constitution]

32. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 27, inclusive, of this Complaint.

33. In denying Plaintiff an extension of the development schedule contained in the P-C Ordinance, while routinely granting extensions to other applicants upon a showing of good cause under Section 18.68 of the City's Municipal Code, Defendants have unlawfully discriminated against Plaintiff, thereby denying to Plaintiff equal protection under the laws and depriving Plaintiff of its rights to due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

34. In seeking to apply to the Project regulations adopted after the P-C Ordinance and after Plaintiff had acquired a vested right to complete Phase 2 under the P-C Ordinance and regulations in effect at the time of its adoption, Defendants have deprived Plaintiff of its right to substantive due process of law in violation of the Fourteenth and Fifth Amendments to the Constitution of the United States.

FOURTH CLAIM FOR RELIEF

[Denial of Equal Protection and Due Process of Law under Art. 1, § 7 of the California Constitution]

35. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 27, inclusive, of this Complaint.

36. In denying Plaintiff an extension of the development schedule contained in the P-C Ordinance, while routinely granting extensions to other property owners upon a showing of good cause unlawfully discriminated against

Plaintiff, thereby denying Plaintiff equal protection under the laws and depriving Plaintiff of its right to due process of law in violation of Article 1, Section 7 of the Constitution of the State of California.

37. In seeking to apply requirements created by regulations adopted after the P-C Ordinance and after Plaintiff had acquired a vested right to complete Phase 2 under the P-C Ordinance and regulations in effect at the time of its adoption, Defendants have deprived Plaintiff of its right to substantive due process of law in violation of the Constitution of the State of California.

FIFTH CLAIM FOR RELIEF

38. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 28 and paragraphs 32 through 34, inclusive, of this Complaint.

39. Through their conduct as described above, Defendants have, under color of state law and municipal ordinances and regulations, deprived Plaintiff of its rights, privileges, and immunities secured by the Constitution of the United States and, in particular, the Fifth and Fourteenth Amendments thereto, in violation of Sections 1981 and following of Title 42 of the United States Code.

40. For such violation Plaintiff is entitled to recover special and general damages and described in paragraphs 26 and 27 of the First Claim of Relief.

41. As an alternative to such special and general damages, Plaintiff is entitled to equitable relief to restore the deprivation of its rights privileges, and immunities by Defendants. Such equitable relief consists in a mandatory injunction from this Court directing Defendants to permit Plaintiff to complete Phase 2 of the Project under the P-C Ordinance and regulations in the effect at the time of its adoption, without further discretionary approvals by the CITY. In addition to such relief, Plaintiff is entitled

to interim damages actually suffered during the period in which Defendants prevented Plaintiff from completing Phase 2; and Plaintiff asks leave to allege the amount of such damages and to prove the same when the amount becomes known.

SIXTH CLAIM FOR RELIEF

[Declaratory Relief]

42. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 41, inclusive, of this Complaint.

43. An actual controversy has arisen now exists between the Plaintiff, on the one hand, and Defendants, on the other hand, concerning their respective rights and duties in connection with the Project. Plaintiff contends that it has the right either

(a) to complete Phase 2 under the P-C Ordinance and the regulations in effect at the time of its adoption without further discretionary approvals by the CITY and, in addition, to receive full compensation for actual damages suffered during the period in which the CITY prevented completion of Phase 2 or, in the alternative,

(b) to receive full compensation for all special and general damages heretofore suffered by Plaintiff as a result of Defendant's conduct described above.

44. Plaintiffs is informed and believes, and alleges on the basis of such information and belief, that Defendants do not accept Plaintiff's contention but take a contrary position.

45. Plaintiff desires an immediate declaration of its rights in the Project. Such declaration is necessary and appropriate in order to resolve the controversy between Plaintiff and Defendants and to eliminate the injury previously

suffered, and still being suffered, by Plaintiff so long as Defendants prevent Plaintiff from completing Phase 2 of the Project.

WHEREFORE Plaintiff prays for judgment against Defendants, and each of them, as follows:

1. For the special damages described in paragraph 26 above according to proof.
2. For the general damages described in paragraph 27 above according to proof.
3. A declaration of the respective rights, duties and obligations of the parties.
4. Plaintiff's reasonable attorneys' fees in this action.
5. Costs arising from the prosecution of this action.
6. Interest as provided by law and determined by this Court on all items of special and general damages requested in paragraphs 1 and 2 of this prayer.
7. For such other, further and additional relief as this Court may deem appropriate.

In the alternative, Plaintiff prays for judgment against Defendants, and each of them, as follows:

A. Equitable relief in the nature of a mandatory injunction allowing Plaintiff to complete Phase 2 of the Project under the P-C Ordinance and the regulations in effect at the time of its adoption without further discretionary approvals by CITY.

B. Interim damages in the amount to be proven at trial for losses, costs, and expenses incurred by Plaintiff during the period in which Defendants prevented the completion of Phase 2 of the Project.

C. Costs arising from the prosecution of this action.

D. Plaintiff's reasonable attorneys' fees in this action.

E. Interest as provided by law and determined by this Court on all of the losses, costs and expenses described in paragraph B of this alternative prayer.

F. For such other, further and additional relief as the Court may deem appropriate.

Dated: December 3, 1981.

BERLINER, COHEN & BIAGINI

By Jeffrey P. Widman
Attorney for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury under Rule 38(b) of the Federal Rules of Civil Procedure.

Dated December 3, 1981

BERLINER, COHEN & BIAGINI
By JEFFERY P. WIDMAN
Attorneys for Plaintiff

Original
FILED
June 4 1982
William Whittaker
Clerk, U.S. District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COURT HOUSE PLAZA COMPANY, a limited partnership,	)	No. C-81-4537 SC
Plaintiff,	)	
-vs-	)	
THE CITY OF PALO ALTO, a municipal corporation, et al.,	)	ORDER GRANTING MOTION TO DISMISS
Defendants.	)	

ORDER GRANTING MOTION TO DISMISS

Plaintiff, a building developer, seeks damages and equitable relief for the actions of the Palo Alto City Council and its Planning Commission in denying building and use permits for the second phase in the construction of a ten-story office building and in denying a one-year extension of the building's development schedule provided by a municipal zoning ordinance. Because plaintiff's action is precluded by the *res judicata* effect of a prior judgment in state court, plaintiff's action must be dismissed.

After the city council's denial of plaintiff's application for the necessary permits and extension of time, plaintiff sought a writ of mandamus from the California Superior Court. Plaintiff was denied relief in superior court and on appeal. *See Court House Plaza Co. v. City of Palo Alto*, 17 Cal. App. 871, 173 Cal. Rptr. 161 (1981). Plaintiff now seeks relief on six causes

of action: federal and state constitution "taking" claims (inverse condemnation); federal and state constitution equal protection and due process claims; a federal civil rights claim; and a declaratory judgment claim. The latter two claims rest on the constitutional violations alleged in the first four, and contain no independent factual allegations.

The doctrine of *res judicata* prevents a plaintiff from relitigating claims adjudicated in another prior proceeding. The Ninth Circuit has extended *res judicata* to ban federal constitutional claims, whether or not asserted in state court,

> where the federal constitutional claim is based on the same asserted wrong as was the subject of [the] state action, and where the parties are the same.

Scoggin v. Schrunk, 522 F. 2d 436, 437 (9th Cir. 1975).

The federal claims here are based on the same alleged wrongful acts which formed the basis of plaintiff's state court mandamus action. Also, plaintiff has sued all the same defendants with the exception of one individual named in the state court proceeding. Consistent with *Scoggin*, plaintiff's claims for declaratory relief, for relief under the civil rights act, and for the alleged federal constitutional violations on which those claims are barred by *res judicata*.

Plaintiff's citation of *Gallagher v. Frye*, 631 F. 2d 127 (9th Cir. 1980) is inapposite. The court in *Gallagher* distinguished *Scoggin* on the facts. In *Scoggin*, plaintiff sought to set aside a foreclosure sale in federal court, after being unable to successfully challenge it in state court. In *Gallagher*, however, plaintiff's initial state court mandamus proceeding attempted to enforce an administrative order of a civil service board against a museum. Plaintiff's federal claim addressed defendant's underlying act of employment termination. The essential issue in the state court proceeding was "the jurisdictional authority of of the state administrative agency." *Id.* at 129-30. The issue in the federal court proceeding was whether the alleged wrongful conduct of the defendant museum violated plaintiff's civil rights.

In the instant case, the alleged violations of the federal constitution have been adjudicated in state court. The state court of appeal upheld the trial court's findings that the denial of the time extension did not deprive plaintiff of equal protection or due process of law, *Court House Plaza v. City of Palo Alto*, 117 Cal. App. 3d at 883, and that the city's adverse zoning action did not constitute a "taking" requiring compensation. *Id.* at 888. Furthermore, even assuming that these constitutional claims had not been raised, having had the ability to raise the federal claims in the state court proceedings bars this court from adjudicating them now. *Scoggin v. Schrunk*, 522 F. 2d at 437.

Finally, when a district court, as in this case, dismisses all federal claims prior to trial, "the proper exercise of discretion requires dismissal" of the state claims. *Wren v. Sletten Construction Co.*, 654 F. 2d 529, 536 (9th Cir. 1981). Such claims should be dismissed for want of federal jurisdiction. *Hodge v. Mountain States Tel. & Tel. Co.*, 555 F. 2d 254, 261 (9th Cir. 1977).

In accordance with the foregoing, it is hereby ordered that defendants' motion to dismiss plaintiff's complaint is granted.

Dated: June 4, 1982

SAMUEL CONTI
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COURT HOUSE PLAZA COMPANY, a limited partnership, Plaintiff,	) No. C-81-4537 SC
-vs-	) JUDGEMENT
THE CITY OF PALO ALTO, a municipal corporation, et al., Defendants.	

It is hereby ordered, adjudged and decreed that defendants' motion to dismiss plaintiff's complaint is granted in accordance with the order entered by the court herein.

Dated: June 4, 1982.

SAMUEL CONTI

United States District Judge

Entered in Civil Docket 6-11 1982

APPENDIX B

(1) Memorandum of the United States Court of Appeals for the Ninth Circuit filed on May 2, 1983

(2) Judgment of the United States Court of Appeals for the Ninth Circuit filed on May 2, 1983

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COURT HOUSE PLAZA COMPANY, a limited partnership,	
Plaintiff-Appellant,	
v.	No. 82-4393
THE CITY OF PALO ALTO, a municipal corporation, STANLEY R. NORTON, BYRON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEARS, Councilmen, PETER R. CARPENTER, MARY R. GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney and LOUIS B. GREEN, Assistant City Attorney,	DC #CV-81-4537-SC MEMORANDUM
Defendants-Appellees.	

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding
Argued and submitted April 14, 1983

Before: KILKENNY, SCHROEDER, and BOOCHEVER, Circuit Judges.

The district court's dismissal, on res judicata grounds, of this federal civil rights action must be affirmed under *Scoggin v. Schrunk*, 522 F.2d 436 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1979).

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COURT HOUSE PLAZA COMPANY, a limited partnership, Plaintiff/Appellant, v. THE CITY OF PALO ALTO, a municipal corporation, STANLEY R. NORTON, BYRON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEARS, Councilmen, PETER R. CARPENTER, MARY R. GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney and LOUIS B. GREEN, Assistant City Attorney, Defendants-Appellees.	)	No. 82-4393 DC CV 81-4537 SC Judgment

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered: May 02, 1983

APPENDIX C

Constitutional and Statutory Provisions Involved

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. United States Constitution, Amendment XIV, Sections 1 and 5:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. Title 28, United States Code Section 1738:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of

the clerk, and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

4. Title 42, United States Code Section 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

5. Title 42, United States Code Section 1982:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

6. Title 42, United States Code, Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

No. 83-172

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

COURT HOUSE PLAZA COMPANY, a limited partnership,
Petitioner,

vs.

THE CITY OF PALO ALTO, a municipal corporation, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DIANE M. LEE
City Attorney
City of Palo Alto
250 Hamilton Avenue
Palo Alto, CA 94301
(415) 329-2171

FRED CAPLOE*
A Professional Corporation
WILLIAMS AND CAPLOE
1060 Grant Street, No. 201
P. O. Box 698
Benicia, CA 94510
(415) 228-3840
**Counsel of Record*
Attorneys for Respondents

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Does res judicata, as applied by California courts, preclude Petitioner's present federal court action under 42 U.S.C. § 1983 based on factual and constitutional claims of injury to property identical to those actually adjudicated in a prior state court action, between the same parties, involving a five week trial which resulted in a final judgment on the merits against Petitioner?

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED

CASES

Constitution

Statutes

Rules

No. 83-172

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

COURT HOUSE PLAZA COMPANY, a limited partnership,
Petitioner,

vs.

THE CITY OF PALO ALTO, a municipal corporation, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Petitioner seeks review in this Court of a judgment by the Court of Appeals for the Ninth Circuit that its federal constitutional claims of taking of its property in violation of the Fifth and Fourteenth Amendment and denial of equal protection and due process under the Fourteenth Amendment are barred by *res judicata*. A brief recapitulation of the procedural history of this case will demonstrate the correctness of the judgment of the Court of Appeals, and the complete absence of any issue worthy of a grant of certiorari by this Court.[1]

A. CHP I: This Court Has Previously Denied a Review of a State Court Final Judgment on the Merits, Against Petitioner and in Favor of Respondents, Following a 5 Week Trial Which Litigated the Same Federal Constitutional Claims and Facts Asserting Injury to Property as Are Alleged Herein

Petitioner originally brought an action in California state court in 1977 challenging Respondents' legislative zoning decision denying permission to build six additional

---

[1]Petitioner's Statement of the Case fails to give a complete picture of the case because, on its face, it is limited to the facts alleged in the present action ("*CHP II*") complaint. The incompleteness is inconsistent with Rule 21.1(g) requiring the Petition to contain "facts material to the consideration of the questions presented". The complete factual and legal issues and asserted federal constitutional violations litigated in *CHP I* and considered in the record before both Courts below will be set forth below in Part I.C of the Argument.

At this point, in compliance with Rule 34.1(g) requirements that Respondents' statement of the case contain "all that is material to the consideration of the questions presented with appropriate references to . . . the record . . .", and pursuant to Rule 201 of the Federal Rules of Evidence, Respondents respectfully request this Court to take judicial notice of Appendices A-G to this brief which contain copies of records of proceedings before the various courts that have considered and litigated this action and related state court actions referred to throughout this brief.

stories on a fully functioning, occupied four story building. *Court House Plaza Co. v. City of Palo Alto, et al.* ("*CHP I*"). Petitioner alleged in *CHP I* a breach of both state and federal constitutional rights, including an unconstitutional taking of property, and denial of due process and equal protection, and sought mandamus based on those substantive claims. See Appendix A.[2] Following full discovery and a 5 week trial, the trial court found that none of Petitioner's constitutional rights had been violated.[3] The Califor-

---

[2]Appendix A to this brief contains Petitioner's lengthy "Petition for Writ of Mandate" in *CHP I*. The substantive federal and state constitutional claims referred to in the text above are specifically raised therein and in the present action ("*CHP II*"). (The *CHP II* complaint is set forth in the Petition, Appendix A, pp. A1-A18.) The due process and equal protection claims are raised in Paragraphs 86 and 87 of *CHP I*, and Paragraphs 32-37 of *CHP II*. The taking claim is raised in Paragraph 92 of *CHP I*, and Paragraphs 28-31 of *CHP II*.

[3]Appendix B to this brief contains separately numbered "Findings of Fact and Conclusions of Law" of the state trial court in *CHP I* (referred to frequently herein as "FF" and "CL"). They were also presented to and considered by both the District Court and the Court of Appeals below. They are contained in the District Court Clerk's Record before the Court of Appeals which will also be cited throughout this brief. That Record will be referred to herein as "CR", followed by "Tab" (the Tab number of the Excerpt of Record filed by Petitioner in the Court of Appeals), and then by a page: line reference in such Tab. Respondents hereby request this Court to take judicial notice of the following portions of the CR which include the Findings: (a) Exhibits 1-8 of Respondents' motion to dismiss in the District Court below (CR Tab 12); and (b) Exhibits 1 and 2 to Respondents' reply to Petitioner's Brief in Opposition to Respondents' Motion to Dismiss (CR Tab 18). Respondents made a similar request for judicial notice in the District Court below (CR Tab 12, p. 2:15 and p. 2:31, fn. (•); p. 3:28 and p. 3:30, fn. (•); p. 6:3-6); and in the Court of Appeals (Respondents' 9th Circuit Reply Brief, p. 5:13-20). Petitioner did not object to either request.

The *CHP I Findings* are found at CR Tab 12, Exhibit 1, Appendix A, pp. A-19 to A-34. For convenience and simplicity, references in this brief will be to Appendix B hereto rather than the CR. References to portions of the CR other than the Findings will be, of course, to the CR.

nia Court of Appeals affirmed, concluding as to the taking issue,

> "Appellant's final argument sounds in inverse condemnation. While both the federal and state constitutions provide that private property may not be taken or damaged for public use without payment of just compensation to its owner, [citing constitutional provisions], a 'mere dimunition' in property value due to a zoning action is not compensable."

CHP I, 117 Cal.App.3d 871, 887-888 (1981). *CHP I* also concluded that there had been no denial of due process or equal protection. 117 Cal.App.3d at 881-883. The California Supreme Court denied Petitioner's petition for hearing. *CHP I*, 117 Cal.App.3d at 888.[4]

Petitioner then filed a Jurisdictional Statement in this Court seeking review of that judgment. Referring directly to its factual and constitutional claims that had been litigated adversely to it in all state courts in *CHP I*, Petitioner contended:

> "*The present case presents a factual situation which gives the Supreme Court jurisdiction to decide the monetary issue where* the Property *Owner has been foreclosed from any use of the rights to six additional stories* of a ten-story office building *by challenged zoning regulations and also has been foreclosed from monetary compensation.*" (Emphasis added)

CHP I, No. 81-404, Jurisdictional Statement, pp. 25-26. This Court dismissed the appeal and, treating it as a petition for certiorari, denied the petition. *CHP I*, 454 U.S. 1074 (November 30, 1981).

---

[4]*CHP I* resulted in a final judgment on the merits. Petitioner has never contended otherwise.

B. CHP II: The Ninth Circuit Court of Appeals Affirmed Dismissal of the Present Action by the District Court on Grounds of Res Judicata.

Three days after this Court denied certiorari in *CHP I*, on December 3, 1981, Petitioner filed the present action in Federal District Court,[5] alleging the identical federal constitutional violations, including an unconstitutional taking of property, and the identical underlying facts, as it alleged in *CHP I*. ("*CHP II*").[6]

The instant complaint does not contain any fact allegations beyond those contained in the *CHP I* complaint; but it does delete some or casts them in slightly rearranged form or verbiage. The *CHP I* complaint has 61 pages and contains fuller detail of the fact assertions set forth in the instant complaint.[7] In their motion to dismiss below, Re-

---

[5]Respondents' counsel herein (the author of this brief) was called by San Francisco Examiner reporter, Don West, on November 30, 1981, and told of an Associated Press wire story he had seen that day that this Court had dismissed Petitioner's appeal. That wire story appeared in the November 30, 1981, issue of the Examiner. On December 2, 1981, the day before the instant complaint was filed, the author of this brief wrote Petitioner telling him of the details of Mr. West's call.

[6]The District Court below, at Respondents' request, took judicial notice of the *CHP I* complaint, as Exhibit 5 to Respondents' motion to dismiss in the District Court. See footnote 3, supra, citing CR Tab 12, Exhibit 5. Although the pleading commencing *CHP I* is called a "petition" and not a complaint, to avoid confusion in this brief with references to Petitioner's Petition in this Court, Respondents refer to the *CHP I* petition as the "*CHP I* complaint".

[7]Appendix A to this brief contains the *CHP I* complaint. The present complaint is set forth in Appendix A to the present Petition, pp. A1-A18, and CR Tab 1.

Petitioner concedes that the instant complaint alleged two kinds of facts: (1) the so-called "historical facts . . . at issue" in *CHP I*; and (2) "ultimate facts" concerning an alleged Fifth Amendment

spondents presented to the District Court the following partial tabular comparison of significant, substantially similar allegations in the two complaints (CR Tab 12, p. 6:20-7:20):

---

taking and damages assertedly not litigated in *CHP I*. Pet, p. 2. The District Court below found:

> "The federal claims here are based on the same alleged wrongful acts which formed the basis of plaintiff's state court mandamus action."

Pet., Appendix A, p. A-20. Since (a) Petitioner concedes that the instant complaint alleged ultimate taking facts (as well as historical facts) and (b) the complaints in *CHP I* and *CHP II* are identical, the so-called "ultimate facts" alleged in *CHP II* had been clearly alleged (and litigated) in *CHP I*. Despite opportunity to do so in the District Court and Court of Appeals below, Petitioner has never specified any facts or evidence, other than those self-same "historical" and "ultimate" facts alleged and tried in *CHP I* and re-alleged in *CHP II*, which it could hope to prove so as to entitle it to relief. See, e.g., Respondents' Reply Brief in the Court of Appeals below p. 4:14-22 affording such opportunity. Petitioner's closing brief in the Court of Appeals stood silent and failed to avail itself of that opportunity. See also, Respondents' Reply to Petitioner's Brief in Opposition to Respondents' Motion to Dismiss in the District Court below, CR Tab 18, p. 2:10-13.

Similarly, the only so-called "facts requisite to a cause of action for inverse condemnation" which Petitioner erroneously asserts it never attempted to establish in *CHP I* (Pet., p. 13) were actually litigated and determined against Petitioner therein. For example, all of Petitioner's investments (called special damages in *CHP II*, Pet. App. A, pp. A11-A12, ¶ 28 of *CHP II* complaint) were alleged in *CHP I* (¶¶ 22, 27, 31, 48, 51, 60, 65—App. A. to this brief, tried and determined not to establish liability (see e.g., App. B hereto, FF 12, 13, 18, 20-24, 27, 50, 60-63; CL 3, 10, 12, 13, 15).

CHP I—State Court (This Brief: App. A)			CHP II—Federal Court (Present Petition: App. A)	
Paragraph Number	Page:Line of Complaint		Paragraph Number	Page: Line of Complaint
Title Title	1:9-23 2:1-14	=	Title	1:13-26 (Parties)
1 & 2	2:16-3:11	=	4 6-8	2:24-3:7 (Parties) 3:15-4:10 (Parties)
3-9	3:13-8:4	=	10 & 11	4:18-5:20 (Project Inception & Approval)
10-21	8:6-14:2	=	15 & 16	7:5-8:25 (Parking Problem)
13	10:10-19	=	15	7:9-11 (Parking Problem)
17	11:19-25	=	16(a) & (b)	7:20-8:2 (Parking Problem)
21	13:17-14:2	=	16(a) & (b)	7:20-8:2 (Parking Problem)
48	29:15-30:7	=	16(e)	8:13-21 (Alleged Dilatory Acts)
22-84	14:4-55:4	=	17-25	9:1-14:2 "
22	14:4-15	=	17	9:1-8 "
24-25	15:1-17:19	=	18	9:9-20 "
26-28	17:21-20:15	=	19	9:21-10:11 "
23	14:17-24	=	20	10:12-20 "
50-80	30:18-53:5	=	24	11:17-13:19 "
52-53	31:18-32:11	=	24(a)	11:17-12:9 "
56-60	33:19-37:8	=	24(b)	12:10-21 "
60	37:13-19	=	24(c)	12:22-13:4 "
61	37:21-38:13	=	24(c)	12:22-13:4 "
66	41:8-42:3	=	24(d)	13:5-15 "
71-76	44:6-49:15	=	24(d)	13:5-15 "
79-80	51:15-53:5	=	24(d)	13:5-15 "
22, 27, 31, 48, 51, 60, 65	Various	=	26	14-15 (Damages)
86-87	56:3-23	=	32-37	16:21-18:8 (Due Process/ Equal Protection)
92	58:18-26	=	28-31	15:26-16:20 (Taking)

In their motion to dismiss below, Respondents also presented to the District Court another tabular comparison

demonstrating how the numerous Findings and Conclusions of the trial court in *CHP I* refuted specific allegations of the instant complaint. CR Tab 12, p. 24:6-26. (See also the trial court's Memo of Decision in *CHP I*. CR Tab 12, Exh. 1, App. A, pp. A1-A18). That tabular comparison, substantially as it appears in the record, is as follows:

Complaint—CHP II	Refuted by CHP I Finding or Conclusion
10	FF 5, 10, 11 & 13; CL 1
11 (p. 5:16-20)	FF 5, 12 & 61; CL 1, 2, 3, 10, 12 & 13; 117 Cal.App.3d at 883-884
14	FF 5, 12, 35, 58, 61; CL 1, 3, 10, 13; 117 Cal.App.3d at 884-885
15 (p. 7:11-14)	FF 6
16(a) (p. 7:20-21)	FF 6
16(c) (p. 8:3-7)	FF 6, 19, 36
16(e)	FF 24
18, 20	FF 25; 117 Cal.App.3d at 886-887
24 (p. 11:17-25)	FF 37, 59, 60, 62, 63; 117 Cal.App.3d at 886-887; CL 1, 10, 12, 13, 15
24(b) & 24(d) (p. 12:10-21)	FF 46, 47; 117 Cal.App.3d at 881-882
24(e)	FF 48, 49, 50, 54
25	FF 46, 47, 53-56; CL 11; 117 Cal. App.3d at 881-882

It is critical to emphasize that the allegations that Petitioner concedes are its "foundation for its claim for damages" (Pet. p. 4), are the very same allegations fully litigated by Petitioner in *CHP I:* (1) its alleged reasonable expectation of completing Phase 2 under the ordinance based on Phase 1 permits and its investments (Pet., App. A, p. A5, ¶ 14) [litigated adversely to Petitioner in *CHP I:* see, *inter alia,* right-hand column opposite ¶ 14 in tabular comparison]; and (2) Respondents' conduct that induced Petitioner to continue investing in the project (Pet., App. A, p. A11, ¶ 25) [litigated adversely to Petitioner in *CHP I:* see, *inter alia,* right-hand column opposite ¶ 25 in tabular comparison above].

On June 4, 1982, the District Judge dismissed Petitioner's complaint on grounds of res judicata, holding,

> "[*T*]*he alleged violations of the federal constitution have been adjudicated in state court.* The state court of appeal upheld the trial court's findings that the denial of the time extension [to build the six story addition] did not deprive plaintiff of equal protection or due process of law, *Court House Plaza v. City of Palo Alto,* 117 Cal. App. 3d at 883, *and that the city's adverse zoning action did not constitute a "taking" requiring compensation.*" Id. at 888 (Emphasis added)

Petition ("Pet."), Appendix A, p. A-21. A three-judge panel of the Court of Appeals for the Ninth Circuit unanimously affirmed the District Court's dismissal in a one sentence unpublished memorandum order on May 2, 1983. 709 F.2d 1515. Pet. Appendix B, p. B-1, B-2. Petitioner now seeks review of the judgment of the Ninth Circuit.

C. CHP III: A Second State Trial Court Has Dismissed as Res Judicata Another Action by Petitioner Against Respondents for Inverse Condemnation Under the California Constitution Which is a Mirror Image of CHP II

Petitioner has also tried to relitigate its *state* constitutional claims in a subsequent state court proceeding. On February 26, 1982, three months after this Court denied certiorari in *CHP I,* Petitioner filed in state court against all Respondents named in *CHP I* and *II* a virtually verbatim copy of the complaint it had filed in federal court three days after this Court's denial of certiorari. Appendix C. (*"CHP III"*). Petitioner later reserved his federal claims, so that the state court in *CHP III* had only state claims before it.* (Petitioner had not reserved any claims

---

*Respondents filed a demurrer and motion to strike the first amended complaint in *CHP III.* Attached to their Memorandum of Points and Authorities in Support thereof were Exhibits A-K. See Appendix D, consisting only of the title page and page 1b listing those Exhibits. Exhibits C-K are essentially the same exhibits that Respondents presented to the District Court below for its consideration in connection with Respondents' motion to dismiss. CR Tab 12, Exs. 1 and 5.

in *CHP I*). In a memorandum of decision filed on June 17, 1982, that state court took judicial notice of the earlier state Court of Appeal holding in *CHP I* "in which the court [of appeal] held that plaintiff was not entitled to compensable damages under a theory of inverse condemnation. Such damages would include any that flow from interference with use of air space." *CHP III*, Appendix E, p. 2:11-14. It concluded that Petitioner's claim was barred by *CHP I*:

> [T]he demurrer to the second cause of action [state inverse condemnation] is sustained on the grounds that that cause of action is barred by res judicata. Since there is no basis for an amendment, the demurrer is sustained without leave to amend."

Appendix E, p. 2:15-18.[*]

In sum, Petitioner litigated and lost all of its federal and state constitutional claims (and their factual predicates) in *CHP I*. It has tried to relitigate those same federal constitutional claims and facts in federal court, and two federal courts have found that they have already been adjudicated and are therefore barred by res judicata. *CHP II*. It has tried to relitigate the same state constitutional claims and facts in state court, and the state trial court has found that they have already been adjudicated and are therefore barred by res judicata. *CHP III*.

Petitioner again seeks certiorari in this Court, this time on the ground that the complaint in federal District Court in *CHP II* alleged "ultimate facts concerning a taking of property (Fifth Amendment claim) and damages *that had not been litigated* in the Mandamus [*CHP I*]." Pet., p. 2 (emphasis added). Petitioner's statement is designed to make this case look as though it presents the question of the res judicata effect of a prior state court judgment on

---

[*]Following judgment of dismissal (Appendix F), Petitioner filed a notice of appeal (Appendix G).

federal claims that could have been, but were not, adjudicated in the prior state court proceeding. But every court that has so far considered the matter has concluded that the record clearly demonstrates that all of Petitioner's taking, due process and equal protection claims and facts were actually presented to the state court in *CHP I* and adjudicated adversely to Petitioner by that court. Thus, the only question this case fairly presents to this Court is whether that conclusion is correct.

SUMMARY OF ARGUMENT

I. In applying res judicata, federal courts must give the same preclusive effect to state court judgments as would be given to those judgments by the courts of that state. 28 U.S.C. § 1738; *Kremer v. Chemical Construction Corporation*, ... U.S. ....., 102 S. Ct. 1883, 1889 (1982). *Kremer*, as does the present case, involved that branch of the preclusion rule called res judicata, or claim preclusion. This Court held that the federal courts must give res judicata effect to a state court decision upholding a state administrative agency's rejection of an employment discrimination claim as meritless when the state court's decision would be res judicata in the state's own courts. 102 S. Ct. at 1888, 1899.

Consistent with *Kremer*, the federal courts below properly applied res judicata to preclude the present action because, under California res judicata principles, it presents constitutional claims of injury to property, and predicate facts, identical to those adjudicated adversely to Petitioner in a prior 5 week state court trial on the merits between the same parties. California courts apply res judicata to hold that a final judgment on the merits precludes any further litigation between the same parties involving the same cause of action—that is, substantive right or harm suffered—regardless of the relief sought or legal theory

pursued in the later action. *Slater v. Blackwood,* 15 Cal.3d 791, 794, 795, 796, 126 Cal.Rptr. 225 (1975).

In the present case, the record of the prior state court proceedings *(CHP I)* was before the courts below. It clearly demonstrates that Petitioner actually litigated all of the present claims and facts but failed to establish liability for a taking or denial of due process or equal protection. The state trial court judgment was affirmed. 117 Cal.App.3d 871 (1981). Both the California Supreme Court and this Court denied review. 454 U.S. 1074 (1981).

In *Kremer,* this Court held that res judicata applied because the state administrative and judicial procedures there involved complied with due process requirements by affording a full and fair opportunity to litigate the merits. 102 S. Ct. at 1897-1899. The present case is a stronger one for res judicata because *CHP I* involved a 5 week state court trial on the merits, whereas *Kremer* involved a far less comprehensive adjudication by an administrative agency.

Because no taking was established in the present case, Petitioner's contentions as to the appropriate remedy for a taking are spurious. *Agins v. City of Tiburon,* 447 U.S. 255, 263 (1979).

II. This case does not present an appropriate factual or legal record to resolve an asserted division among the federal circuit courts of appeals in § 1983 cases where the claimant contends that his claims could have been but were not actually litigated previously. The courts below held that Petitioner actually litigated the present claims; and did not rest their holding on the "could-have-raised" rule. Pet., App. A, p. A21; App. B, p. B1.

Petitioner's reliance on *Haring v. Prosise,* 51 U.S.L.W. 4736 (1983) is misplaced because there the claimant *had not actually litigated* his claims in the prior state proceeding. 51 U.S.L.W. at 4741. *Haring* exclusively involved

collateral estoppel (issue preclusion), not res judicata, and is therefore inapposite.

III. Granting the present petition would eviscerate the salutary preclusive policies of comity and repose reaffirmed by this Court in *Kremer* (102 S. Ct. at 1895) because of the full trial on the merits of the present claims between the same parties in *CHP I*. Conversely, it would not undermine any policy behind § 1983. In effect, the petition is yet another veiled effort to have this Court reweigh evidence and adjudicate claims fully adjudicated in *CHP I*. This Court has clearly declared that it will not perform such a function. *Fry Roofing Company v. Wood*, 344 U.S. 157, 160 (1953).

ARGUMENT

I

THE FULL FAITH AND CREDIT STATUTE, 28 U.S.C. § 1738, REQUIRES FEDERAL COURTS TO GIVE THE SAME PRECLUSIVE EFFECT TO PRIOR STATE COURT JUDGMENTS AS WOULD BE GIVEN THERETO BY THE COURTS OF THAT STATE. UNDER RECENT DECISIONS OF THIS COURT, RES JUDICATA, AS APPLIED BY CALIFORNIA COURTS, PRECLUDES PETITIONER'S PRESENT ACTION ("CHP II") SINCE IT RAISES CONSTITUTIONAL CLAIMS OF INJURY TO PROPERTY, AND PREDICATE FACTS, IDENTICAL TO THOSE ADJUDICATED ADVERSELY TO PETITIONER IN A LENGTHY PRIOR STATE COURT TRIAL ON THE MERITS ("CHP I")

Res judicata in federal courts for prior state court adjudication is governed by the federal Full Faith and Credit Statute, 28 U.S.C. § 1738.[10] This Court has faith-

[10] 28 U.S.C. § 1738 provides in pertinent part:

"The . . . judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State. . . ".

fully applied this statute in an unbroken line of decisions. In its most recent decision under the statute, *Kremer v. Chemical Construction Corporation*, ... U.S. ....., 102 S.Ct. 1883, 1889 (1982), this Court reiterated the well-established preclusion rule of the statute:

> "Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the states from which the judgments emerged."

See also *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Under principles of res judicata, as applied in California courts to judgments of California courts, Petitioner is clearly barred from relitigating its claim of unconstitutional taking of property as well as the other federal constitutional claims raised in the present case.

A. California Courts Hold That a Final Judgment on the Merits in Favor of a Defendant is a Complete Bar Under Res Judicata to Further Litigation Between the Same Parties Involving the Same Substantive Right or Harm Suffered.

The California Supreme Court has held that, under the doctrine of res judicata,

> "A valid final judgment on the merits in favor of a defendant serves as a complete bar to further litigation on the same cause of action."

Slater v. Blackwood, 15 Cal.3d 791, 795, 126 Cal.Rptr. 225 (1975) (opinion by Richardson, J.). For res judicata purposes, California defines a cause of action according to the primary right theory:

> "the violation of a single primary right constitutes a single cause of action . . ."

Boccardo v. Safeway Stores, Inc., 134 Cal.App.3d 1037, 1043, 184 Cal.Rptr. 903 (1982); *Wulfjen v. Dolton*, 24 Cal. 2d 891, 895, 151 P.2d 846 (1944). According to *Slater*, a

> "'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted . . ."

Slater, supra, 15 Cal.3d 794, 795. In *Slater,* res judicata was applied as a bar to a negligence complaint filed after California's guest statute was declared unconstitutional following the plaintiff's earlier unsuccessful action under that statute. The court held that the primary right alleged to have been violated—freedom from personal injury—was the same in both cases and that there was only one cause of action for one personal injury incurred by reason of one wrongful act.

In the present case, Petitioner has only one cause of action for one property injury incurred by reason of the denial of the time extension and permits to build an additional six stories on its existing, occupied four story building. The harm, or wrong, allegedly suffered in both *CHP I* and *CHP II* is precisely the same: interference with constitutionally protected property rights. *CHP I* litigated that alleged interference and determined that Petitioner had no reasonable investment-backed expectation in the addition. The trial court in *CHP I* found:

> "Petitioner did not acquire vested rights to construct Phase 2 by virtue of overbuilding Phase 1 or in any other respect."

App. B, p. A67, CL 12; see also CL 10 and 13, and *CHP I,* supra, 117 Cal.App.3d at 887.

CHP I also litigated all of the allegedly wrongful acts, purposes and intents of the City, and determined that the City never intended to nor did delay nor hinder Petitioner, but rather acted in good faith at all times. The trial court held:

> "**. . . judging from the demeanor and credibility of the City's witnesses, the Court finds no evidence of any deliberate or willful attempt to delay, hinder or obstruct Petitioner in the completion of either phase one or phase two.**"

CR Tab 12, Exh. 1, App. A, p. A18; App. B, p. A57-58, FF 22-24, p. A60, FF 32-37, p. A65-66, FF 59-63, p. A67,

CL 15. *CHP I* further found that Petitioner's failure to proceed with Phase 2 was due to its own self-created problems, not any act of Respondents. See Part I.C, infra, pp. 22-23.

CHP I clearly determined that there had been no interference with, or harm to, Petitioner's primary right to be free from economic injury because of any act of Respondents.

In *City of Los Angeles v. Superior Court (Levy)*, 85 Cal. App.3d 143, 149 Cal.Rptr. 320 (1978), (opinion by Kaus, P.J.), a subsequent state action for damages for seizure and loss of personal property was barred by a prior unsuccessful federal civil rights action on same facts since,

> ". . . its constitutional overtones aside, the civil rights action was designed to vindicate precisely the same interests in Levy's personal property that he seeks to vindicate in the matter before us."

Id. at 153. The court continued:

> "The contours of Levy's civil rights action were therefore shaped by his interests in the personal property converted and withheld by the city and county employees—*precisely the same rights which the second state action is all about.*" (Emphasis added)

Id. at 154.

Similarly, the contours of Petitioner's instant action are shaped by its real property interests in Phase 2 allegedly interfered with in *CHP I*—precisely the same interests as the present case is all about.[11]

---

[11]See also *Mattson v. City of Costa Mesa*, 106 Cal.App.3d 441, 164 Cal.Rptr. 913 (1980) (subsequent state negligence action was barred by a prior unsuccessful federal civil rights action on same facts, even though pendent state negligence claim was not previously litigated, since both actions involved harms to personal rights). *(Continued on next Page.)*

The foregoing California cases are consistent with *Scoggin v. Schrunk*, 522 F.2d 436 (CA9 1975), also relied on by the District Court and Court of Appeals below. *Scoggin* held that res judicata applied there to bar federal court litigation because the federal constitutional claim was based on the same asserted wrong between the same parties involved in the prior state judgment on the merits. *Id.* at 437. See also *Lurie v. State of California*, 633 F.2d 786, 789 (CA9 1980).

California cases also hold that res judicata bars subsequent litigation on the same cause of action regardless of the relief sought or legal theory pursued. *Slater*, supra, 15 Cal.3d at 796; *Wulfjen v. Dolton*, supra, 24 Cal.2d at 895-896; *Boccardo*, supra, 134 Cal.App.3d at 1043. Petitioner fails to come to grips with the fundamentally erroneous premise on which its petition is based: namely, (1) that *CHP II* merely seeks a different form of *relief* (damages) from that sought in *CHP I* for the identical alleged constitutional wrongs; and (2) that, in any event, this search for different relief is abstract and vacuous because on the present record *CHP I* determined that Petitioner

---

Cases refuse to apply res judicata where a clearly different harm is assertedly suffered in a subsequent action. See, e.g., *Agarwal v. Johnson*, 25 Cal.3d 932, 160 Cal.Rptr. 141 (1979). *Agarwal* simply refused to bar a state court tort claim for damages for harm to *personal* rights (defamation and intentional infliction of emotional distress) following plaintiff's unsuccessful statutory action for damages and injunctive relief in federal court for harm to *property* rights (employment discrimination under Title VII of the Civil Rights Act of 1964) both based on the same underlying facts. (It should be noted that Title VII grants substantive rights whereas 42 U.S.C. § 1983 merely provides a remedy to redress other substantive rights violations. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979).) *Agarwal* also noted that the findings in the Title VII action were aimed primarily at Defendants' employment practices. 25 Cal.3d at 955.

had failed to prove the predicate facts to establish liability entitling it to such relief.[12]

As this Court has recognized,

> "Because no taking has occurred, we need not consider whether a State may limit the remedies available to a

---

[12]Although the significant factor in determining a cause of action is the harm suffered and although the existence of the same facts in the two actions is not always conclusive, (*Agarwal v. Johnson*, supra, 25 Cal.3d at 954), nonetheless, both historically and at present, California courts pay serious attention to the existence or not of facts predicate to establishing harm. In *City of Los Angeles v. Superior Court*, supra, 85 Cal.App.3d at 152, n. 12, the court noted the historical roots of the primary right theory followed in *Slater*, supra, and in that case:

> "12. As quoted by Witkin, Pomeroy's primary right theory is formulated as follows: ' "Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself . . . Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action . . . the existence of a legal right in an abstract form is never alleged by the plaintiff; but instead thereof, the *facts from which that right arises are set forth, and the right itself is inferred therefrom. The cause of action as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong.*" (Pomeroy, Code Remedies (5th ed.) p. 528; . . .'."

(Emphasis added). See also *Ford Motor Co. v. Superior Court*, 35 Cal.App.3d 676, 679, 110 Cal.Rptr. 59 (1973):

> "Pursuant to California's so-called 'primary right theory' of what constitutes a single cause of action, even if a plaintiff has various forms of relief available to him . . . or can present different legal theories for relief . . . *there remains only one cause of action if the facts indicate that only one primary right* of the plaintiff *has been violated.*" (Emphasis added)

> person whose land has been taken without just compensation."

Agins v. City of Tiburon, 447 U.S. 255, 263 (1979).

In essence, the Petition boils down to this: because Petitioner could not prove facts to establish liability for equitable relief, based on alleged constitutional wrongs, in *CHP I*, it nonetheless should be allowed to relitigate those same facts in hopes of establishing liability for both equitable relief and damages, still based on the same alleged constitutional wrongs, in *CHP II*. This case represents the very type of futile effort to revive a dead action that res judicata as applied by this Court and California courts was intended to stop.

> ". . . res judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."

Allen v. McCurry, supra, 449 U.S. at 95-96; *Kremer*, supra U.S. , 102 S. Ct. at 1889-1890, n.6; see also *Panos v. Great Western Packing Co.*, 21 Cal.2d 636, 637, 134 P.2d 242 (1943).[13]

---

[13]To escape the record in this case and thereby hope to avail itself of inapposite recent authority of this Court (*Haring v. Prosise*, supra), Petitioner spuriously contends that it did not actually litigate federal claims in *CHP I* which it "theoretically" could have raised there. Pet p. 5. However, assuming arguendo that such is true, California res judicata doctrine bars such relitigation. *Olwell v. Hopkins*, 28 Cal.2d 147, 152 (1946); *Wulffjen v. Dolton*, supra, 24 Cal.2d at 895; *Boccardo*, supra, 134 Cal.App.3d at 1044. This California rule is in accord with *Scoggin v. Schrunk*, supra, and the overwhelming majority of federal circuit courts of appeals that have addressed the question; and with 1B Moore, Fed. Prac. 1981 Supp. ¶ 0.405, p. 55. See Part II, infra, pp. 26-29.

Petitioner's heavy reliance on *Haring v. Prosise*, supra, is to no avail for obvious reasons. First, this Court's unanimous opinion

B. A California Court (CHP III), On The Specific Claims And Facts Of The Present Case (CHP II), Has Held That The CHP I Judgment Bars Later Relitigation of the Same State Claims and Facts.

Aside from the fact that Petitioner's present action is barred by res judicata as applied by California courts for the reasons in Part I.A, this Court need not rely on its own reading of California res judicata law, and its application to the facts of this case, for the state trial court in *CHP III* has held that, *on the very claims and facts of this present case,* Petitioner is precluded from raising its state taking claim by the *CHP I* judgment. Appendix E.

---

reflects the fact that the constitutional claim—illegal Fourth Amendment search—underlying the subsequent § 1983 federal civil damages action against police who conducted the search was *not actually litigated* in the prior criminal proceeding. 51 U.S.L.W. at 4739, 4741.

Second, *Haring I* was a criminal proceeding involving different parties, different issues and different claims from *Haring II*. *Haring* exclusively involves that branch of the preclusion doctrine called collateral estoppel (issue preclusion); whereas the instant case involves res judicata (claim preclusion). Petitioner distorts these two aspects of preclusion. Assuming arguendo the correctness of its cryptic statement that res judicata is "the more comprehensive of the two rules" (Pet., p. 5, footnote), its quantum leap to the conclusion that the "distinction is not critical" is unwarranted on any score and reflects a complete misreading of *Haring*. Petitioner erroneously concludes that

> "*Haring* clearly marked one boundary for the application of *claim* and issue preclusion in a § 1983 action." (Emphasis added)

Pet., p. 5. *Haring* is silent on claim preclusion. Thus, it is irrelevant that it was decided after the judgment of the Court of Appeals below became final. Pet., p. 5.

As discussed below, *Kremer*, not *Haring*, provides the controlling reasoning, doctrine and authority in this case. *Haring* is not inconsistent with *Kremer*, dealing as it does with different facts and law. Petitioner overstates the reach of the *Haring* "preclusion" rule in a transparent effort to avoid *Kremer* and its own facts.

C. Petitioner is Clearly Seeking to Relitigate in CHP II Precisely the Same Constitutional Claims and Predicate Facts Which It Had a Full and Fair Opportunity To Litigate, And Actually Litigated, In CHP I.

The record in this case is not appropriate to raise the issue of the correct remedy for an actual taking precisely because *CHP I* conclusively determined that no taking or other constitutional violation occurred. The Petition disintegrates with the realization that Petitioner's remedy argument is blind to the actual record in this case considered by the District Court and the Court of Appeals below. Without actually admitting it, the Petition attempts unfairly and inaccurately to change that record.

The *CHP I* findings and judgment, as affirmed by the state court of appeal, following full discovery and 5 weeks of trial, directly refute all allegations in *CHP II*.[14] From the passage of the zoning ordinance in 1964 allowing construction of an office building and related garage in two phases, Petitioner was fully aware that the ordinance contained conditions precedent to building permit issuance and use of the property. For example, it imposed a fixed, limited period for start of construction of both Phase 1 (4-story office building and parking garage) and Phase 2 (six more floors of the same office building and more levels on the garage, both to be started by October 31, 1976, 12 years later). CR Tab 12, Exh. 1, App. E, pp. E1-E2. Nothing in the ordinance provided that Phase 1 completion guaranteed or vested any right to complete Phase 2 (App. B, p. A66, CL 3) nor that Phase 2 approval was related to future demand. Indeed, the court of appeal in *CHP I* noted that the City reserved the right to determine

---

[14]Each side presented 7 witnesses at trial. Petitioner offered 261 exhibits and the court admitted 253; Respondents offered 61 exhibits and 55 were admitted. Each side filed pre-trial and post-trial briefs. The 10-volume trial transcript contained 2,683 pages.

current code compliance before issuing building permits, and that Petitioner assumed the risk that new regulations might prevent construction originally planned. *CHP I*, supra, 117 Cal.App.3d at 884, 885. See also App. B, p. A-55, FF 12.

Petitioner misstates the record in portraying the ordinance as an agreement. Pet., p. 3. The trial court specifically concluded that the ordinance was a proper exercise of the police power through zoning and was not a contract. App. B, p. A-33, CL 1; *CHP I*, 117 Cal.App.3d at 884.

Because of the lengthy period of time for start of Phase 2 and the periodic, intervening building code changes incorporated into City ordinances (App. B, p. A-61, FF 40) and complied with by Petitioner's architect (App. B, p. A-56, FF 16), City imposed various conditions precedent to uses allowed in the ordinance. A discretionary use permit was required for "any and all uses" specified by the ordinance. Other conditions regulated structures, site use and parking.

The Court of Appeal in *CHP I* found that the Phase 1 4-story building was "fully functioning and substantially leased" in 1968.[15] *CHP I*, supra, 117 Cal.App.3d at 878. The *CHP I* complaint alleged substantial leasing of all of the building. App. A, p. A-13, ¶ 22. The trial court had found:

> "It is a self-contained, functional structure even without the additional six floors, and *has been occupied and used up to and including the present.*" (Emphasis added)

App. B, p. A-55, FF 13. Photographic exhibits from the trial in *CHP I* of that existing occupied 4-story building

---

[15]**The Court of Appeal also found that the Phase 1 building permit was "expressly limited to construction of the first 4 stories and basement" (117 Cal.App.3d at 885); and that "[o]nly the four-story building has been completed". 117 Cal.App.3d at 878.**

in its intended and actual use as of the trial were shown to the District Court below. CR Tab 12, Exhs. 7 and 8.

The trial court in *CHP I* found that Petitioner did not commence construction on Phase 2 by overbuilding Phase 1 to accommodate it; and that it "did not acquire vested rights to construct Phase 2 by virtue of overbuilding Phase I to accommodate it or in any other respect". App. B, p. A-65, FF 61; p. A-67, CL 12. Thus, *CHP I* clearly settled that Petitioner had no reasonable, investment-backed expectation in Phase 2; that the City had not interfered with Petitioner's property rights, vested, constitutionally protected or otherwise; and that Petitioner has an economically viable use of the property. *Agins v. City of Tiburon,* supra, 447 U.S. 255; *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 138 (1978).

CHP I found that Petitioner's failure to proceed with Phase 2 was in no way attributable to Respondents. The following details underlying this failure were set forth in Respondents' motion to dismiss in the District Court below. CR Tab 12, pp. 19:6-22:4.

In 1969, before even applying for a building permit or obtaining Phase 2 financing, Petitioner ordered its general contractor to immediately place all subcontracts for off-site fabrication of items required for the 6-story addition including, inter alia, steel, elevators and exterior facade; and it thereby "fully obligated itself to pay for [those] Phase 2 development costs prior to obtaining financing to construct Phase 2 and prior to being issued a building permit . . .". App. B, p. A-57, FF 20, 21; *CHP I,* supra, 117 Cal.App.3d at 886. As the Court of Appeal stated, despite such off-site fabrication of some of the steel and elevators after permit issuance, Petitioner did not rely on an existing permit when it obligated itself; but rather incurred expenses *"in anticipation of"* a permit. *Id.* at 886. Petitioner admitted that the foregoing was a mistake which

resulted in its financial difficulties and the firing of the errant general partner. The mistake was not attributable to Respondents. App. B, p. A-57, FF 22. Petitioner's inability to obtain Phase 2 financing was not due to any act of Respondents. App. B, p. A-57, FF 22-23.

In 1973, a fifty-foot height limit was enacted for all buildings in the City except in zoning districts like Petitioner's. *CHP I,* supra, 117 Cal.App.3d at 878. The trial court in *CHP I* found no evidence of an anti-high rise philosophy on the part of the City nor any intent to delay, obstruct or hinder Petitioner; rather that Respondents acted in good faith at all times. App. B, p. A57-A58, FF 23-24; p. A60, FF 32-37; p. A55-A56, FF 59-63; p. A67, CL 15. *CHP I* found no impropriety regarding the height limit, as erroneously alleged by Petitioner. Pet., p. 3.

From 1973-1976, Petitioner did nothing about Phase 2 despite being told by the City in 1975 that it might agree to a reduction of parking spaces. App. B, p. A61, FF 41.

The Court of Appeal in *CHP I* stated that the trial court, on reviewing all of the evidence before it, determined that the Respondents' denial of Petitioner's request to extend the deadline for start of Phase 2 was reasonable and non-discriminatory; and it further found that the Respondents' denial was based on Petitioner's insufficient showing of good cause. *CHP I,* supra, 117 Cal.App.3d at 878-879, 881-883. The detailed facts underlying those determinations are set forth in the trial court's Findings upheld by the Court of Appeal. App. B, pp. A62-66, FF 46-63. The trial court concluded, inter alia, that Petitioner

> ". . . had not at any time acquired vested rights to a building permit to construct Phase 2; therefore, the [City's] denial of the one-year extension did not constitute a deprivation of vested rights."

App B, p. A67, CL 13.

The foregoing review of what was actually litigated in *CHP I* flatly refutes Petitioner's various contentions. First, Petitioner's specious insistence that the *CHP I* vested right determination "affected only a preliminary procedural matter, not any substantive issue necessary to the decision" (Pet., p. 13) is totally inconsistent with both the trial court and court of appeal findings therein.[16]

Second, Petitioner persists that *CHP I* "sought only equitable relief", despite the obvious fact that *CHP II* also seeks equitable relief (as well as damages) (Pet., App. A, p. A-17, Prayer, ¶ 3 and A); and despite California res judicata authority that bars *CHP II* regardless of the relief sought (*Slater,* supra, 15 Cal.3d at 795).

Third, Petitioner misstates the record in pretending that it did not "attempt to establish those facts requisite to a cause of action for inverse condemnation" (i.e. no economically viable use, Respondents' acquisitory intent, and injury to real property). Pet., p. 13. Petitioner raised allegations of a taking in *CHP I* (App. A, p. A-48, ¶ 92); and the trial court found none. To the contrary, it found that the existing 4 story building is an economically viable use (App. B, p. A55, FF 13); that there was no acquisitory

---

[16]In upholding Respondents' decision to deny the time extension request, the trial court Memo of Decision found:

> "The action taken by the council in denying the request was supported by more than substantial evidence. By no means, in reason or logic, could it properly or accurately be said that the council's action was taken arbitrarily, capriciously or entirely lacking in support. In this regard, ***assuming arguendo as petitioner contends, that the test of the council's action requires the Court to exercise its independent judgment, the Court has no hesitancy in stating that if this case were the test, there is ample evidence from which the Court using its independent judgment would have reached the same conclusion as the city council.***"

CR Tab 12, Exh. 1, App. A, p. A-15.

intent but rather that Respondents did not intend to delay or hinder Petitioner at any time and acted in good faith (CR Tab 12, Exh. 1, App. A, p. A18; App. B, p. A57-58, FF 22-24, p. A60, FF 32-37, p. A65-66, FF 59-63, p. A67, CL 15); and that there was no injury to Petitioner's vested property rights because it had none. *CHP I* likewise affirmed that there had been no inverse condemnation because, at most, there was only a mere diminution in value. *CHP I*, 117 Cal.App.3d at 887-888. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 135 (1978).

On such a record, it is misleading for Petitioner to argue the asserted unavailability of the appropriate remedy for a taking in California.[17]

---

[17] Similarly, because *Haring* is factually and doctrinally distinguishable from this case, it is spurious for Petitioner to suggest that it qualifies for the "subsequent-change-in-controlling-law" exception referred to in *Haring*. Pet., p. 16. Assuming arguendo a change in the law, controlling California case law on res judicata rejects the contention that subsequent changes in the law require relitigation. *Slater v. Blackwood*, supra, 15 Cal.3d at 797.

It is equally idle for Petitioner to argue entitlement to federal relitigation under another of the *Haring* exceptions, i.e., that California courts are unable or unwilling to protect federal rights. Pet., p. 12, quoting *Haring*, and p. 14. California courts are fully equipped to and have exercised their concurrent jurisdiction over § 1983 claims where appropriate facts exist. *Williams v. Horvath*, 16 Cal.3d 834, 129 Cal.Rptr. 453 (1976); *Rossiter v. Benoit*, 88 Cal. App.3d 706, 152 Cal.Rptr. 65 (1979).

Although the taking remedy issue is irrelevant in this case, California courts do award money damages for inverse condemnation under appropriate facts not involving physical damage: *Varjabedian v. City of Madera*, 20 Cal.3d 285, 296, 142 Cal.Rptr. 429 (1977); *Peacock v. County of Sacramento*, 271 Cal.App.2d 845, 851-852, 861-862, 77 Cal.Rptr. 391 (1969); *City of Los Angeles v. Tilem*, 142 Cal.App.3d 694, 702, 704, ... Cal.Rptr. ... (1983).

Finally, Petitioner's reference to *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (CA9 1983) is unavailing. First, Petitioner ignores the fact that *Martino* addressed itself to the appro-

CHP I clearly goes beyond the facts in *Kremer*, more than satisfying the "due process/full and fair opportunity to litigate the merits" requirement set forth in that case. *Kremer*, supra, ... U.S. ....., 102 S. Ct. at 1897-1899.

II

THIS CASE DOES NOT PRESENT AN APPROPRIATE FACTUAL OR LEGAL RECORD TO RESOLVE AN ASSERTED DIVISION AMONG THE CIRCUIT COURTS OF APPEALS IN "COULD-HAVE-RAISED" § 1983 CASES BECAUSE OF THE ACTUAL PRIOR LITIGATION IN CHP I.

There are several reasons why this petition does not merit this Court's further attention regarding Petitioner's assertion of conflicting preclusion rules under § 1983. Pet., pp. 6-11.

First, Petitioner did actually litigate the present constitutional claims and their factual predicates in *CHP I*.

Second, the District Court below unequivocally rested its principal preclusion finding on the fact of actual prior litigation (". . . the alleged violations of the federal constitution *have been adjudicated* in state court." Emphasis added. Pet., App. A, p. A21). That Court merely noted additionally the *Scoggin* "could-have-raised" rule. Ibid. citing *Scoggin*, supra, 522 F.2d at 437.

Third, in affirming, the Court of Appeals below gave no indication that the basis of its affirmance was anything other than its agreement with the District Court that

---

priate remedy *assuming a taking*. 703 F.2d at 1147. That issue is not reached here for lack of a taking. Second, *Martino* did not require the Ninth Circuit to follow California law, as does 28 U.S.C. § 1738 in the instant case.

CHP I actually litigated all constitutional claims presented herein.

Thus, the record herein clearly reveals that Petitioner's contention of a conflict among the circuits is truly a non-issue in this case.

It should also be noted that, in *Scoggin*, the particular, narrow issue that plaintiff was precluded from relitigating was the issue of the defendant's failure to give notice before selling her property; and plaintiff had raised that same contention in the prior state proceeding where she sought to regain title. In the subsequent federal proceeding plaintiff was "still seeking to regain title, but now, for the first time, contending that her civil rights were violated by the sale of her property without notice." *Scoggin*, supra, 522 F.2d at 437. The *Scoggin* decision is fair on its facts because, (1), as here, the cause of action was the same in both cases—merely the relief changed; and (2) the plaintiff there could have sought that same § 1983 relief in state court since it had concurrent jurisdiction of such actions.

Petitioner's pretense that this Court may be sending conflicting signals to courts of appeals with the advent of *Haring*, following upon the heels of *Allen* and *McCurry*, (Pet., pp. 7-10), is contradicted by Petitioner's own clear understanding that "the holding of *Kremer* reflected this Court's apparent movement toward expanding the scope of preclusion rules". Pet., p. 10. Petitioner understands that *Kremer*, a clear res judicata holding, forecloses granting the instant petition; but, it invents a non-existent cloud over the effect of *Kremer* in this case by trying to engraft onto it inapposite collateral estoppel principles from *Haring*. Petitioner flirts with conceding, if it does not actually do so, that it received at least "a very small measure of due process in *CHP I*. Pet., p. 10. Thus, while Petitioner's effort to weave a basis for granting of the

instant writ may be artful, it proves too much—namely, the facts do not support its petition because it did actually litigate its present claims in *CHP I*.

Indeed, that *Allen* and *Kremer* are sending a clear signal to lower courts is evidenced by the very case Petitioner attempts to use to support a contrary position. *Sachetti v. Blair*, 536 F. Supp. 636, 640-641 (S.D.N.Y. 1982). *Sachetti* was decided just before *Kremer*. Thus, *Kremer* reinforces the correctness of *Sachetti*.

Nor do the dissents in *Allen* and *Kremer* support Petitioner. In remarks aptly describing the instant case, Justice Blackmun, dissenting in *Allen*, stated:

> "I do not doubt that principles of preclusion are to be given such effect as is appropriate in a § 1983 action. In many cases, the denial of res judicata or collateral estoppel effect would serve no purpose and would harm relations between federal and state tribunals."

449 U.S. at 106. And, in dissent in *Kremer* he noted that he would apply res judicata

> "if the complainant had already lost a trial on the merits in state court."

Kremer, supra, ... U.S. ....., 102 S. Ct. at 1911; accord, Justice Stevens, in dissent in *Kremer*, Ibid. Since the *Kremer* majority extends res judicata effect to a state court judgment affirming the decision of a state administrative agency as being on the merits (*Kremer*, supra, 102 S. Ct. 1883, 1896, and n. 21); and since the dissents in *Allen* and *Kremer* agree that res judicata applies where the complainant "lost a trial on the merits in state court"; there can be no dispute that the judgment of the court in *CHP I* is res judicata as it was preceded by a full trial on the merits.

In considering Petitioner's urging of a conflict among the circuits on the "could-have-raised" rule, it is also per-

tinent to note two other points. First, 28 U.S.C. § 1738 requires reference to California law. Second, that law is consistent with the overwhelming majority of circuit courts of appeals. *Olwell v. Hopkins,* supra, 28 Cal.2d 147, 152.

III

DENIAL OF THE INSTANT PETITION WOULD DO NO INJUSTICE TO THE SALUTARY POLICY UNDERLYING § 1983. GRANTING IT WOULD EVISCERATE THE SALUTARY PRECLUSIVE POLICIES OF COMITY AND REPOSE RECENTLY REAFFIRMED BY THIS COURT IN ALLEN AND KREMER

Kremer reiterated the fundamental and critical policies of comity and repose, announced in *Allen,* underlying the claim preclusion doctrine. *Kremer,* supra, ... U.S. ....., 102 S. Ct. at 1889-1890, n. 6; 1895-1896. Petitioner concedes the relevance of these policies. Pet., p. 18. But the task of reconciling these policies with those of § 1983, as contended by Petitioner, is simply non-existent in this case because of the full trial on the merits of the instant claims in *CHP I.*

But assuming that task did exist, it easily resolves in favor of the denial of the Petition. Just as *Kremer* could not succeed on his Title VII discrimination claim consistent with the judgment of the administrative agency that he was not fired because of religion or national origin (*Kremer,* supra, 102 S. Ct. at 1896); so, in this case, Petitioner could not succeed on its § 1983 claim consistent with the judgment of *CHP I,* following a full trial on the merits, that it had no vested rights in Phase 2 and had suffered no constitutional or other harms.

Similarly, just as the New York appeals court affirmance of the administrative agency's judgment necessarily decided that Kremer's claim under New York law was meritless and "thus . . . also decided that a Title VII claim *arising from the same events* would be equally meritless"

(emphasis added) (*Kremer,* supra, 102 S. Ct. at 1896); so, in this case, the court of appeal in *CHP I* necessarily decided that the vested rights claim was substantially meritless under California law (not merely a determination of scope of review), and thus also decided that the constitutional claims underlying a § 1983 action "arising from the same events" would be equally meritless.

Again closing its eyes to the record herein, Petitioner opines that, if the petition were granted, this Court might rule that in cases like this res judicata should not apply. That is simply another way of importuning this Court to reweigh evidence and re-examine claims fully litigated in the trial and appellate courts of California. This Court has never recognized that it has or should have such a function. *Fry Roofing Company v. Wood,* 344 U.S. 157, 160 (1953).

Just as this Court found in *Kremer,* so it should find here:

> ". . . comity and federalism interests embodied in § 1738 are not compromised by the application of res judicata . . ."

102 S. Ct. at 1895.

CONCLUSION

For the reasons and on the authorities stated herein, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

DATED: September 28, 1983.

DIANE M. LEE
City Attorney
FRED CAPLOE*
A Professional Corporation
WILLIAMS AND CAPLOE
**Counsel of Record*
Attorneys for Respondents

(Appendices follow)

Appendix A

Cartwright, Saroyan, Martin & Sucherman, Inc.
Robert E. Cartwright
Randall D. Morrison
160 Sansome Street, Suite 900
San Francisco, California 94104
(415) 433-0440

Attorneys for Petitioner

In the Superior Court for the State of California
in and for the County of Santa Clara

No. 32449

Court House Plaza Company, a limited partnership,
Petitioner,

v.

The City of Palo Alto, a municipal corporation, Stanley R. Norton, Byron D. Sher, Fred S. Everly, Roy L. Clay, Kirke W. Comstock, Scott T. Carey, John J. Berwald, Anne R. Witherspoon, John V. Veahrs, Councilmen, Peter F. Carpenter, Mary Gordon, William E. Green, Ray W. Mitchell, Frank J. Rack, Emily M. Renzel, Anne Steinberg, Planning Commissioners, Stan J. Nowicki, Chief Building Inspector, James O. Glanville, Zoning Administrator, Naphthali H. Knox, Director of Planning and Community Environment, Robert K. Booth, Jr., City Attorney, and Louis B. Green, Assistant City Attorney,
Respondents.

[Filed May 23, 1977]

PETITION FOR WRIT OF ORDINARY MANDAMUS [C.C.P. § 1085] AND ADMINISTRATIVE MANDAMUS [C.C.P. 1094.5]

To the Above Court:

Petitioner, Court House Plaza Company, petitions this Court for a Writ of Mandamus under Code of Civil Procedure Section 1085 directed to respondents, The City of Palo Alto, a municipal corporation, Stanley R. Norton, Byron D. Sher, Fred S. Eyerly, Roy L. Clay, Kirke W. Comstock, Scott T. Carey, John Berwald, Anne R. Witherspoon, John V. Beahrs, Councilmen, Peter F. Carpenter, Mary Gordon, William E. Green, Jay W. Mitchell, Frank J. Rack, Emily M. Renzel, Ann E. Steinberg, Planning Commissioners, Stan J. Nowicki, Chief Building Inspector, James O. Glanville, Zoning Administrator, Naphthali H. Knox, Director of Planning and Community Environment, Robert K. Booth, Jr., City Attorney, and Louis B. Green, Assistant City Attorney, and by this verified petition represents that:

1.

Petitioner, Court House Plaza Company, is a limited partnership pursuant to the provisions of Sections 15501 et seq. of the Corporations Code of the State of California and at all times herein mentioned was and now is a partnership doing business under the name of Court House Plaza Company, and has filed the certificate and published the notice of doing business under such name as required by sections 17910 et seq. of the Business and Professions Code of the State of California.

2.

Respondent, the City of Palo Alto, is a municipal corporation under the laws of the State of California. Respondents, Stanley R. Norton, Byron D. Sher, Fred S. Eyerly, Roy L. Clay, Kirke W. Comstock, Scott T. Carey, John T. Berwald, Anne R. Witherspoon and John V. Beahrs are members of the City Council of the City of Palo Alto; respondents, Peter F. Carpenter, Mary Gordon, William E. Green, Jay W. Mitchell, Frank J. Rack, Emily M. Renzel

and Anne Steinberg are members of the Planning Commission of the City of Palo Alto. Respondents, Stan J. Nowicki, James O. Glanville, Naphthali H. Knox, Robert K. Booth, Jr. and Louis B. Green are respectively Chief Building Inspector, Zoning Administrator, Director of Planning and Community Environment, City Attorney and Assistant City Attorney of the City of Palo Alto.

3.

Petitioner is the owner of the four-story office building located at 260 Sheridan Avenue, Palo Alto, California which was constructed in Phase 1 of a two-phase development project for a ten-story office building provided for in Ordinance No. 2224 (Exhibit 1) establishing a P-C District allowing professional and commercial offices, agencies and uses. Ordinance No. 2224 was passed by the City Council of the City of Palo Alto on December 28, 1964 to become effective upon expiration of thirty days from its passage. Ordinance No. 2224 included the following development schedule:

> *Phase 1.* Start of construction of the 4-story office building on "Lot Area A", and the parking garage on "Lot Area C" within two (2) years of Council approval.
>
> *Phase 2.* Start of the construction of the 5th to and including the 10th story on "Lot Area A" and additional levels on the parking garage on "Lot Area C" by October 31, 1976.

Ordinance No. 2224 was passed by the City Council of the City of Palo Alto without any discussion on the length of time for the development schedule.

4.

This project had its genesis in a zone change application filed on August 31, 1964 and brought on hearing before the Planning Commission of the City of Palo Alto on October

28, 1964. The minutes of this meeting (Exhibit 2) show that the following statement was made by the Planning Officer:

> "The Planning Officer advised that the proposal is to permit a multi-story office and parking structure complex that would allow not only professional and administrative uses but would include a number of offices and agencies of a commercial nature. * * *
>
> * * *
>
> Surrounding uses were outlined and it was noted that the development is proposed to be constructed in three stages, *as dictated by demand.* Initially, only four stories of the office building would be built, together with adjacent parking on the main site and the first levels of the parking structure across Sheridan Avenue. Later, the office building would be extended to *ten stories* and new levels would be added to the parking structure. An additional three-story office building is planned for later developments also. At ultimate development in *1981* there would be a total of 117,661 square feet of net rentable floor area.
>
> In regard to the proposed buildings, the *10-story* building would be approximately *117 ft. high* plus an 8 + ft. elevator penthouse. * * *
>
> The *7-story* parking structure would be approximately *78 ft. high.* * * *." (Emphasis supplied)

The following appears in the same minutes of the Planning Commission:

> *"Mr. Albert A. Hoover,* architect for the development, spoke at length and expressed the hope that the Commission would be impressed with the amount of time and thought which has gone into the project. He said he is aware that a development of this height and magnitude may seem overwhelming at this point but urged that it be kept in mind that the initial construc-

tion will involve only four stories in line with immediate need and that the entire proposal is in the vein of what is happening and can be expected to happen in the future in this area; also that the development schedule will be regulated by the conditions of the P-C District and as accelerated *by demand*. He called attention to the expected expansion of the county office facilities and Standford Industrial Park." (Emphasis supplied)

A motion of the Planning Commission (passed 6 to 1) approved a zone change from R-3:P to P-C for the subject property with a "Development schedule calling for start of the first stage of construction within two years of Council approval, the second stage by October 31, 1976 and the third stage by October 31, 1980." There was no discussion of the length of time for the development schedule after the motion was made and none before other than that set forth above.

5.

Petitioner is informed and believes that the length of time for the development schedule was selected by the developer with the anticipated demand to control the development schedule and that the dates for commencement of the later phases of the development were not considered to be critical by the Planning Commission and could be extended or accelerated as dictated by the exigencies of the ensuing times.

6.

On November 17, 1964 there was a continuation of the meeting of the Planning Commission of October 28, 1964 in which the subject project was tentatively approved subject to certain restrictions of permitted uses and the requirement for certain setbacks. The minutes (Exhibit 3) of this meeting show that on motion (passed 4 to 3) the Planning Commission adopted Resolution No. 4 recom-

mending to the City Council adoption of an ordinance rezoning the property from R-3:P to P-C for the reasons contained in the resolution, but without any amendment of the resolution.

7.

The project was brought before the City Council in its meeting of December 14, 1964. Its minutes (Exhibit 4) show that Resolution No. 4 of the Planning Commission was received and considered. These minutes state the following:

> "In answer to questions, the Planning Officer reviewed setback requirements for the *ten-story office building* and the parking structure.
>
> * * * * *
>
> Albert Hoover, 535 Ramona Street, the architect, referred to the model on display before the Council and said the plan was conceived as a first class building. In answer to query, he explained the first phase of the office building would be a four-story building; that the second phase would be to increase it to a *ten-story building;* that the third phase had been deleted because it included the property which had since been withdrawn by the applicant." (Emphasis supplied)

Upon motion the City Council approved (passed 11 to 3) an ordinance rezoning the subject property from R-3:P to P-C with certain additional uses. There was no discussion at the City Council on the length of time for the development schedule, again indicating that the dates for commencement of construction for Phase 2 were not critical.

8.

The minutes (Exhibit 5) of the City Council meeting of December 28, 1964 show that on this date, after a second reading, the City Council adopted Ordinance No. 2224 (passed 12 to 2).

9.

Ordinance No. 2224 also included the following provisions:

"(3) *Structures*

Building location, dimension, heights and other improvements shall be substantially as indicated on the approved Development Plan.

(5) *Off-Street Parking*

There shall be one (1) off-street parking space for each one hundred forty-four (144) square feet of net usable floor area of the ground floor and one (1) parking space for each two hundred eighty-eight (288) square feet of net usable floor area on upper floors. Minimum dimensions of parking spaces, aisle and access space shall be as provided in Section 4.51 of the Zoning Ordinance, except that the minimum width of each parking space shall be nine (9) feet."

10.

Petitioner is informed and believes and therefore alleges that in May 1965 a proposal was made to trade land of Petitioner for land of the City of Palo Alto in the block bounded by Birch Street, Page Mill Road, Park Boulevard and Sheridan Avenue, the parcel to be used for the proposed parking structure. In August of 1965 the Division of Highways of the State of California reported to the City Council of the City of Palo Alto that the proposed interchange for the Page Mill Road-El Camino Real intersection would require additional right-of-way from Petitioner's parcel on the north side of Page Mill Road. On September 13, 1965 the City Council of the City of Palo Alto voted to defer the matter of the land exchange and refer it to the Planning Commission for a restudy with the possible temporary amendment of the P-C zoning with the thought that perhaps some arrangement could be made

without a parking structure until such time as Phase 2 of the building program was started or until street alignment of the Oregon Expressway was determined or some other formula for further amendment. On September 29, 1965 the Planning Commission voted to initiate a public hearing to consider amending the P-C Development Plan so that the initial parking requirement could be deferred until the necessary alignment of the right-of-way could be determined.

11.

The minutes (Exhibit 5A) of the Planning Commission meeting of October 27, 1965 show that plans submitted for the construction of the Phase 1 office building portion of the project indicated a parking requirement of 149 spaces. Petitioner under Phase 1 had the right to proceed with the building of a parking structure on the Sheridan Avenue parcel to meet this parking requirement, but indicated its willingness to forego the construction of the parking structure, which would make any future county acquisition of a right-of-way very expensive, by proposing to provide approximately 100 parking spaces on open land until a decision was made on the interchange. The Zoning Administrator recommended that it would be desirable to protect this right-of-way and suggested that the Planning Commission of the City of Palo Alto adopt a resolution finding that the public interest, convenience and general welfare require that the P-C Development Plan for the project be amended to allow construction of the four-story office building with the highest possible number of temporary parking spaces being provided and that construction of the parking structure be required to start within eighteen months of the establishment of realignment of Page Mill Road, or, if the realignment of Page Mill Road is not determined and no land trade is made within two years after Council approval

of this Development Plan change, it be mandatory construction of the parking garage be started within one year additional.

12.

At this time the Zoning Administrator also advised that Santa Clara County had asked that no allowance for improvement of Petitioner's property fronting on Grant Avenue be made pending possible condemnation of that property for use in connection with the North County Court House located on Grant Avenue. The minutes of the meeting (Exhibit 6) of November 17, 1965 of the Planning Commission show that the Planning Commission unanimously approved a resolution which followed the recommendation of the Zoning Administrator.

13.

The minutes (Exhibit 7) of December 13, 1965 show that the City Council passed Resolution No. 3860 (Exhibit 8) which amended Ordinance No. 2224 by adding thereto subparagraph (6) reading as follows:

> (6) "Construction of four stories of the office building shall be permitted with 107 temporary offstreet parking spaces being provided in lieu of the permanent parking structure. Said spaces shall be provided within 500 feet of the subject property. Construction of the permanent parking structure shall start within eighteen (18) months of the establishment of the realignment of Page Mill Road or, if the realignment of Page Mill Road is not determined and no land trade is made within two (2) years after Council approval of this Change of Development Plan, construction of the parking structure must begin within one (1) year thereafter."

14.

Use Permit 65-UP-8 (Exhibit 9) was granted by the Zoning Administrator on January 17, 1966 for the location and construction of an office building in the project in accordance with the P-C Development Plan approved by Ordinance No. 2224 as amended by Resolution No. 3860 and in accordance with approved drawings including floor plans for a basement, main floor and floors 2, 3 and 4 and exterior elevation drawings. The Use Permit also provided that a Building Permit should not be issued until parking plans showing the location and layout of 107 temporary parking spaces had been approved.

15

Building Permit A 25823 (Exhibit 10) was granted on June 14, 1966 with approval of 107 spaces of temporary parking. Construction of the four-story office building with the basement commenced shortly thereafter and was completed on August 17, 1967.

16

The County of Santa Clara in 1966 commenced a condemnation suit for the approximately 11,500 square foot parcel of Petitioner fronting on Grant Avenue for expansion of the North County Court House. After a jury trial, the County acquired the parcel for the amount of the jury award in the Spring of 1967.

17

Because the realignment of Page Mill Road had not occurred and no land trade had been made with the City of Palo Alto, the City Council by Resolution No. 4055 (Exhibit 11) passed on December 11, 1967 extended the development schedule of the P-C Development Plan by providing that subparagraph (6) of Section 3 of Ordinance No.

2224 be amended as follows to give an additional year of time.

> "(6) Construction of four stories of the office building shall be permitted with 107 temporary offstreet parking spaces being provided in lieu of the permanent parking structure. Said spaces shall be provided within 500 feet of the subject property. Construction of the permanent parking structure shall start within eighteen (18) months of the establishment of the realignment of Page Mill Road or, if the realignment of Page Mill Road is not determined and no land trade is made by December 13, 1968, construction of the parking structure must begin within one year (1) year thereafter."

18.

In order to complete the permanent financing on Phase 1 of the P-C Development Plan, Petitioner requested that the permanent parking requirement for the Phase 1 development be changed from 149 parking spaces in a parking structure to 107 attendant offstreet parking spaces as set forth in a drawing A-100 dated April 2, 1968 with the complete requirement for 371 spaces in a parking structure for the 10-story building in the project to remain in force. During the preceding time period, 107 temporary offstreet parking spaces had been provided by 72 spaces on the site where the parking garage was planned and with the remainder on the parcel extending to Grant Avenue.

19.

The Grant Avenue parcel had been acquired in 1967 by the County of Santa Clara which meant that all 107 spaces for parking had to be provided on the single parcel remaining for parking—the site for the parking garage. This made it necessary to request approval of attendant parking to obtain the necessary 107 parking spaces. See Exhibit 11A.)

20.

The minutes (Exhibit 12) of the Planning Commission meeting on April 17, 1968 show that the Planning Commission adopted Resolution No. 62 (Exhibit 13) recommending amendment to the P-C District Development Plan to acquire 107 offstreet attendant parking spaces for the Phase 1 four-story building and that the Phase 2 six-story addition offstreet parking requirement be retained at the full amount of 371 spaces. It also recommended that the City of Palo Alto negotiate with Petitioner to make available on an interim basis the two City-owned parcels located in the block bounded by Birch Street, Sheridan Avenue, and the Oregon-Page Mill Underpass for the purposes of furnishing additional parking until such time as the County has established the Plan Line or the widening of the Underpass or Phase 2 is started, whichever is sooner.

21.

In Resolution No. 4113 (Exhibit 14) passed on May 6, 1968 the City Council of the City of Palo Alto as reflected by its minutes (Exhibit 15) amended the P-C Development Plan in accordance with the recommendation of Resolution No. 62 of the Planning Commission of the City of Palo Alto and rescinded Resolution Nos. 3864 and 4055 and resolved the following:

> "Construction, use and occupancy of four stories of the office building shall be permitted with 107 attendant parking spaces being provided in lieu of the permanent parking structure. Said spaces shall be provided as shown in that diagram denominated "Exhibit 5" which forms part of Exhibit "A" attached hereto. Construction of the permanent parking structure shall start on or before October 31, 1976. The fifth through tenth floors of the office building shall remain unused and unoccupied until the parking structure is completed."

22.

Petitioner by the Spring of 1968 had been able to lease substantially all of the space in the four-story building except for the basement which was being reserved for a men's club. Petitioner seeing excellent leasing activity instructed Albert A. Hoover & Associates before February 15, 1968 to proceed forthwith in the completion of a complete set of working drawings for the six-story addition for Phase 2 of the project. The drawings were completed by the Fall of 1968. The structural steel and elevators were ordered for the six-story addition because of the long lead time for these items. The six-story addition was put out for bid and a quotation was received by December 12, 1969.

23.

During this time, the Dillingham project (now called Palo Alto Square) was approved by the City of Palo Alto which included two ten-story buildings, each of the same size as Petitioner's ten-story building, and a complex of smaller office buildings all within approximately three blocks of Petitioner's building. This Dillingham project would be competing directly for tenants with Petitioner's six-story addition.

24.

In attempting to obtain a Building Permit in 1969 for the construction of the six-story addition, a controversy arose with respect to a non-mechnically ventilated interior smokeproof tower with which the building was originally designed. During the design of the ten-story office building in Phase 1 from August of 1964 through May of 1965 under the 1961 Building Code of the City of Palo Alto, the Fire Department of the City of Palo Alto was aware of this design using an interior smokeproof tower. Nevertheless, in May of 1965 the Fire Department summarily rejected the design and insisted that an exterior smoke-

proof tower be provided. The City Manager of the City of Palo Alto called a meeting of all interested parties and thereafter, as a result of the meeting, wrote a letter dated June 4, 1965 (Exhibit 15) specifically approving the use of a non-mechanically ventilated interior smokeproof tower and giving approval to proceed with the design using such a smokeproof tower, because it was not prohibited by the 1961 Building Code. The four-story building was built with the interior smokeproof tower, although no smokeproof tower at all was required for a four-story building.

25.

Following the design of the ten-story building, the City of Palo Alto adopted the 1967 Building Code which permitted interior smokeproof towers upon approval of the Fire Department and the Chief Building Inspector. Early in 1970 the City of Palo Alto was considering the adoption of the 1970 Building Code which had provisions for a mechanically ventilated interior smoke proof tower whereas the 1967 Building Code had none. Because the Fire Department of the City of Palo Alto by 1970 no longer approved of interior smoke proof towers, it was considering requiring that the additional six stories be sprinklered. Petitioner took the position at that time that it had a vested right to build the ten-story building in two phases because it was a single project designed in accordance with the 1961 Building Code and in effect at the time of approval of the project. The Fire Department of the City of Palo Alto took the position that the most recently adopted Building Code was the applicable Building Code. The matter was submitted to the City Attorney of the City of Palo Alto. As set forth in the City Attorney's letter of February 3, 1970 (Exhibit 17), a meeting was held between certain officials of the City of Palo Alto and Petitioner in which it was agreed that the City Attorney would instruct the Building Department of the City of Palo Alto to issue a Building Permit for Phase 2 of the

building, with the Building Permit to be issued upon Petitioner agreeing to meet the following conditions:

1. Applicant will be allowed to add six floors to the present structure with an interior smokeshaft.

2. Applicant will supply mechanical ventilation of the smokeshaft, the design of which shall be reviewed and approved by our Building and Fire Departments.

3. Applicant will provide emergency standby power for the mechanical ventilation system.

4. The mechanical ventilation will operate on each of the floors.

5. Applicant will provide during the life of the building a monthly report and certification from a registered mechanical engineer showing the efficiency of the mechanical ventilation system and certifying that the system is completely operative in every way. These reports and inspections shall be done at applicant's expense.

The City Attorney of the City of Palo Alto in an interoffice communication (Exhibit 18) of February 3, 1970 to the City Manager stated:

> "As you know, this ruling comes from this office on the basis that Ordinance 2224 contemplated the 10 story building with an interior smokeshaft and the development plan attached to the ordinance specifically shows a 10 story building with no exterior smokeshaft. This understanding was confirmed by Mr. Keithley's letter of June 4, 1965. Therefore, it would appear that *certain rights vested.* These rights are with respect to a building with an interior smokeshaft, which building is unsprinklered." (Emphasis supplied)

Building Permit No. A28937 (Exhibit 19) was issued by the City of Palo Alto on February 16, 1970 for the six-story addition to the existing four-story office building

with 371 offstreet parking spaces being required for the ten-story office building.

26.

Petitioner filed an application for a Use Permit on February 13, 1970 to construct the additional six stories for the ten-story office building. On February 18, 1970, the Zoning Administrator for the City of Palo Alto indicated his intention to deny the application as follows:

> "It is found that the proposed building would be approximately fourteen (14) feet higher than shown on the approved Development Plan which variation is not within reasonable limits of administrative discretion to approve."

Petitioner filed an appeal to the Planning Comission of the City of Palo Alto on February 19, 1970 pointing out that when Ordinance 2224 was passed the plans submitted in conjunction therewith were preliminary development plans which included an elevation drawing which did not show a dimension for the overall height of the building. The plans di include a scale for reference purposes which when used would indicate a floor-to-floor dimension of approximately 11 feet with a total height of approximately 118 feet from grade to the top of the parapet, with 17 feet for the first floor, 11 feet for the floors 2-9, 13 feet for the tenth floor and 1½ feet for the parapet and 8 feet of additional height to the top of the penthouse. The architect, Albert A. Hoover and Associates, in making the final design for the buiding in conjunction with the preparation of the detail drawings for the four stories in Phase 1 of the project found that the eleven foot floor-to-floor dimension was inadequate to provide sufficient space above the suspended ceiling for the air conditioning and electrical runs and therefore had to increase the floor-to-floor dimension to 12 feet. The final plans for the first four floors of the ten-story office building were submitted to the City of Palo Alto and show a total height

for the four-story building of 55½ feet with 18 feet for the first floor, 12 feet for floors 2-4 and 1½ feet for the parapet. Thus, a one foot increase in the floor-to-floor dimension was shown on these plans. The plans were approved by the City of Palo Alto with one foot increase in the floor-to-floor dimension and the four story building was constructed in accordance therewith. The ten-story building as finally designed had a total height of approximately 131 feet from grade to the top of the parapet with 18 feet for the first floor, 12 feet for floors 2-9, 15 feet 6 inches for the tenth floor and 1½ feet for the parapet and an additional 8 feet to the top of the penthouse.

27.

By the time of this rejection of Petitioner's application for a Use Permit for the six-story addition, the steel had already been fabricated at a cost in excess of $330,000.00. The Planning Commission on March 11, 1970 as shown by its minutes (Exhibit 20) in a motion (passed 3 to 1) approved the application for a Use Permit to allow Petitioner to build approximately 14 feet higher than shown on the approved Development Plan.

28.

The City Council on March 30, 1970 as shown by its minutes (Exhibit 21) in a motion (passed 8 to 2) followed the recommendation of the Planning Commission and approved the application of the Petitioner for a Use Permit for the construction of six additional stories on the existing four-stories building located at 260 Sheridan Avenue, Zone District P-C. The minutes of the meeting of March 30, 1970 were approved in the City Council meeting of April 13, 1970 (see minutes—Exhibit 22). Use Permit 70-Up-3 (Exhibit 23) was thereafter granted on March 30, 1970 to construct the office building in accordance with submitted plans with the 14-foot increase in height.

29.

The County of Santa Clara to widen the Page Mill underpass on August 28, 1969 commenced a condemnation action to obtain by eminent domain approximately 4000 square feet from Petitioner's Sheridan Avenue parcel which was to be used for the permanent parking structure. A condemnation award was made to Petitioner by August of 1970 and the County of Santa Clara took the 4000 square feet. This made it impossible from that time forward for Petitioner to build the permanent parking structure.

30.

Petitioner throughout 1969 and through most of 1970 attempted to arrange permanent financing for the six-story addition to the office building. During this time Petitioner was faced with the eminent domain action by the County of Santa Clara and delays in obtaining a Building Permit and a Use Permit for the six-story addition from the City of Palo Alto. Interest rates were escalating in the United States and, because California has a 10% usury law, mortgage money became essentially unavailable in California in 1970. These facts along with the fact that the Palo Alto Square project would be competing directly with Petitioner made it impossible for Petitioner to obtain permanent financing for the six-story addition after the Building and Use Permits had been obtained.

31.

Petitioner in proceeding with Phase 2 of the ten-story office building had by this time made a substantial good faith investment of time and money in addition to the sum of approximately Four Hundred and Fifty Thousand Dollars ($450,000.00) which already had been invested in Phase 1 four-story structure to accommodate the Phase 2 six-story addition. Petitioner had complete architectural drawings prepared for the six-story addition including the

structural, electrical, mechanical and plumbing drawings. Petitioner also had ordered fabrication of the necessary structural steel and had ordered the elevators for the six-story addition all at a cost in excess of Five Hundred Thousand Dollars ($500,000.00) which obligations had to be paid though financing could not be obtained in 1970 and 1979 to proceed with the construction of the additional six floors. Petitioner had thus expended One Million Dollars ($1,000,000.00) in connection with Phase 2.

32.

In order to make arrangements to pay for the obligations incurred by the acquisition of the architectural drawings, the steel and elevators for the six-story addition the Petitioner partnership on October 20, 1971 was reorganized from a general partnership known as the California Lands Building Company into a limited partnership known as the Court House Plaza Company.

33.

During the period 1968-1969, Petitioner had attempted to resume actual construction, but was delayed by the controversy over the smokeproof tower and the 14 foot height variation which delayed issuance of the necessary permits. During the period 1971-1975, construction of the six-story addition could not proceed, because it was impossible to obtain permanent take-out financing for the six-story addition (see letter of Robert Fiddaman—Exhibit 24). During this period, the Palo Alto Square Office Complex with its two ten-story towers was very slow in leasing, with a major portion of the office space remaining vacant for a number of years up to 1976. This situation was a product of the serious economic recession in the United States and in the Palo Alto area during this period.

34.

Petitioner is informed and believes and therefore alleges that it has a vested right to commence construction on Phase 2 of the project, as originally designed in Phase 1, because of the good faith expenditure of great amounts of time and money in connection with Phase 2 as well as Phase 1 of the project.

35.

Petitioner is informed and believes and therefore alleges that Petitioner by acquiring the architectural drawings, the structural steel and the elevators for the six-story addition at a cost of over $500,000.00 long prior to October 31, 1976 had commenced construction of Phase 2 prior to October 31, 1976 and therefore has the vested right to complete Phase 2 of the P-C Development Plan.

36.

Petitioner is informed and believes and therefore alleges that it was the City of Palo Alto which requested Petitioner to forego construction of the parking structure so that any future acquisition of land by the County of Santa Clara for widening of the Page Mill Underpass would be less expensive. This in effect tolled the development schedule which had been proposed by Petitioner and adopted by the City of Palo Alto. The subsequent condemnation action and acquisition of a substantial portion of Petitioner's land planned for the parking structure by the County of Santa Clara in 1970 made it impossible for Petitioner to build the proposed parking structure. The City of Palo Alto is therefore estopped from asserting that the parking structure must be built as originally planned or insisting that the development schedule must be strictly adhered to.

37.

During the economic recession of 1971-1976 the Use Permit for the six-story addition was renewed for one year

through March 30, 1972. It expired on March 30, 1972 because only a one year renewal is permitted.

38.

Petitioner on September 27, 1972 met with Messrs. Glanville, Nowicki and McLaughlin of the staff of the City of Palo Alto to ascertain the requirements to be met to obtain a new Use Permit for the six-story addition. Petitioner is informed and believes and therefore alleges that by this date, the political climate in the City of Palo Alto had changed from that in the 1960's. The "Super Block" had been turned down by the voters and there was a definite turn against high rise buildings. Petitioner received a "cautious" reception from the staff and was advised that a future meeting would be set up to discuss the matter.

39.

McLaughlin, Assistant Fire Chief of the Palo Alto Fire Department in an interoffice communication (Exhibit 25) on 260 Sheridan of October 3, 1972 addressed to Building Official, the City Attorney and the Planning Director with carbon copies to the City Manager and the Fire Chief advised that Petitioner had requested a meeting between the building official and the fire department to discuss plans to add six floors to the existing four-story building. McLaughlin indicated that in reviewing the history of the project it would be desirable for those personnel of the City of Palo Alto who would be involved to sit down together prior to this meeting and stated: "We should have a firm consensus of what our position is now." A meeting was held on October 6, 1972 with Stone, City Attorney, Booth, Assistant City Attorney, Nowicki, Building Department Inspector and McLaughlin, Assistant Fire Chief being present for the purpose of having the involved City Departments reach an agreement on a uniform position towards Petitioner's proposal to add six stories to the subject building. The minutes

(Exhibit 26) of the meeting reflect that a complete agreement was reached by all those present at the meeting and that Petitioner would be required to "secure a P.C. Amendment, Use Permit, Environmental Impact Statement and comply with current codes which require a sprinkler system and mechanical ventilation be provided for the proposed addition."

40.

Petitioner is informed and believes and therefore alleges that at least as early as October 6, 1972 officials of the staff of the City of Palo Alto conspired to take arbitrary and capricious actions to deny Petitioner due process in connection with Petitioner's proposal to proceed with the six-story addition and to commence the same within the development schedule. The requirement for an Environmental Impact Statement was contrary to the law because projects which had been approved prior to November 23, 1970 are not covered by the California Environmental Quality Act. The requirement that the six-story addition comply with current codes was contrary to law because the addition of the six stories was the second phase of a two-phase project to complete a high rise structure designed under the 1961 Building Code, approved in 1964 and the first phase (four stories of a total of ten) of which had been completed in 1967.

41.

Petitioner rather than being able to meet with the appropriate staff of the City of Palo Alto on October 11, 1972 to discuss such issues was advised that the staff had already had such a meeting between themselves and was informed by McLaughlin and Stone of the requirement for sprinklers and mechanical ventilation of the smokeproof tower for the six-story addition. Petitioner believing that an amicable resolution could be had on completing the project decided to investigate the costs of sprinklers and mechanical ventilation. Petitioner and petitioner's architect Albert A. Hoov-

er, had a further meeting with Stone on October 12, 1972 to discuss offstreet parking for the project and the sprinkler requirement.

42.

Petitioner continued plans to proceed with the six-story addition and arranged conferences with the proposed general contractor John and Mape Construction Co., had conferences with officials of Santa Clara County, further conferences with officials of the City of Palo Alto, made a trip to New York City to arrange for take-out financing (see letter of October 19, 1972—Exhibit 27), and had conferences with officials of Santa Clara County, further Brown Construction and Mrs. Pierson for acquisition of property for offstreet parking.

43.

On February 27, 1973 Petitioner filed an application (Exhibit 24) for a Use Permit to add six stories to the existing four-story building. At that time Petitioner received conflicting opinions from Nowicki and Booth as to what property could be considered to be within the 500 foot requirement for offstreet parking of Chapter 18.84 the Palo Alto Municipal Code. Pursuant to a telephone request for clarification to Stone, a letter (Exhibit 29) of March 1, 1973 was received which specified that the 500 foot requirement would be measured by line of sight. Stone also advised that although sprinklering and mechanical ventilation would be required on the new top six floors, no sprinklering would be required in the already constructed first four floors.

44.

Glanville in considering Petitioner's Use Permit application wrote a Memorandum (Exhibit 30) to Naphtali H. Knox dated March 13, 1973 which indicated that on March 2, 1972 he had advised Knox that an application had been received for a Use Permit for the construction

of the six upper stories on the office building at 260 Sheridan Avenue, Zone District P-C, to replace a previous Use Permit that had been granted by the City Council but had lapsed. The Memorandum then states that Knox had asked when the Council had approved the previous one remarking that "the date might make a difference, and that the present Council might uphold the denial of the Use Permit." Glanville then reviewed the history of the approval of the prior Use Permit and closed the Memorandum by stating:

> "My inclination is to approve the application in accordance with the City Council's 1970 action since Ordinance 2224, Resolution 4113 and the development schedule for the project are still valid."

45.

Glanville in a conference with Petitioner on March 14, 1973 without informing Petitioner of the March 13, 1973 Memorandum to Knox, informed Petitioner that because of the 14-foot height variation, the project would have to be resubmitted to the City Council because the Council membership had changed, even though it had been approved by an earlier City Council.

46.

Petitioner now requests that Glanville be compelled to perform the ministerial act of approving the Use Permit because Petitioner had complied with the requirements therefor and Glanville abused his discretion in denying it. Glanville was obviously influenced by Knox to deny Petitioner's request for a Use Permit when it was Glanville's sole responsibility as Zoning Administrator of the City of Palo Alto to make the decision without interference.

47.

Since Petitioner planned to go before the City Council on a zone change application in connection with the park-

ing for the six-story addition at a later date, Petitioner in a letter (Exhibit 31) of March 20, 1973 withdrew the application for a Use Permit with the intention of resubmitting it within a few months. However, an application for a Use Permit was not filed within a few months, because in the first part of July, 1973, Petitioner was advised by its principal tenant Systems Control, Inc. that, rather than waiting for additional space to be constructed in Petitioner's building by the addition of six floors, Systems Control, Inc. was going to move to the Page Mill facility. Petitioner thus lost its chief tenant.

48.

Petitioner thereafter through the remainder of 1973, 1974 and 1975 continued to contact the City and to investigate possible property acquisitions to meet the offstreet parking requirements for the six-story addition. The City at this time, however, acquired the Power parcels in close proximity to project, which foreclosed one solution to Petitioner to provide the necessary offstreet parking for the six-story addition, as pointed out in Petitioner's letter to the City Council of March 25, 1975 (Exhibit 31A). Petitioner acquired an option as of July 5, 1969 to purchase the Power parcels for offstreet parking for the six-story addition. This option was exercised on October 30, 1969 and a purchase agreement (Exhibit 31B) of November 7, 1969 was entered into to purchase the Power parcels. Because of the inability to obtain financing the Power parcels were permitted to report back to Power late in 1971 with a quitclaim being executed in 1973.

49.

Petitioner was advised by Glanville that, because of the attempt of the City of Palo Alto to reduce the emphasis on the automobile and to cause more reliance on public transportation (the California Avenue stop of the Southern Pacific and Santa Clara bus routes being in close

proximity to Petitioner's building), the City of Palo Alto might be amenable to a reduced parking requirement for the building, as for example a reduction from 371 to 300 spaces for the completed ten-story building.

50.

Petitioner after the conversation with Glanville sought other solutions to provide the additional parking for the six-story addition and conferred extensively with Gordon McAdam of Albert A. Hoover and Associates in connection with parking structure designs. Petitioner met with Knox, Glanville and Atkinson in connection with obtaining a possible extension of time in the development schedule for a P-C zone change and was advised that such extensions of time had been routinely granted by the City of Palo Alto in the past and that there should be no difficulty in the present case of demonstrating a good faith effort to proceed with the six-story addition. Thereafter Petitioner had additional conferences with McAdam on parking and early as November 29, 1975 began discussions with Barry Roth on the design of a two-level parking structure across from 260 Sheridan Avenue and in connection with surface parking on the lots east of the building to provide 300 parking spaces for the ten-story building. In connection therewith Roth made numerous sketches and plans to determine the optimum design for the parking structure. Roth then undertook land surveys and prepared preliminary parking plans for both sites for submission to the Planning Commission.

51.

Petitioner in the meantime contacted Mrs. Pierson's real estate agent to make arrangements to either acquire her 8900 square foot parcel adjacent to Petitioner's property or to obtain her permission to rezone the same for incorporation in the parking site east of the building.

52.

Petitioner also undertook the work to make a submission to the Planning Commission on the zone change application required to provide the necessary parking for the six-story addition. The zone change application was filed by Petitioner on June 30, 1976. This zone change application included a portion of the city street on Sheridan Avenue and also requested a contingent P-C zone on the Pierson parcel because Mrs. Pierson would not give her consent to rezone the same.

53.

Even though Glanville knew of the urgency for moving ahead rapidly with the zone change application, it was not until Petitioner received Glanville's letter (Exhibit 32) of August 6, 1976 that Petitioner was advised that a zone change could only be requested on property owned by Petitioner. After numerous consultations with the City Attorney's office Petitioner was advised that the only arrangements that would be satisfactory to the City of Palo Alto would be a binding contract of purchase of the Pierson parcel or alternatively an agreement by Mrs. Pierson to permit her parcel to be rezoned. In addition it was ascertained that it would be necessary to exclude any City of Palo Alto property from the zone change application.

54.

During the time that the zone change application was being readied for submission to the Planning Commission, Petitioner began working on the actual details of commencing construction and contacted Otis Elevator and Viking Sprinkler. Petitioner also contacted the State Fire Marshall in connection with the State of California High-rise Regulations. Arrangements were made to obtain quotations on the cost of construction for the parking structure

submitted to the Planning Commission on the zone change application. A meeting was had with Ted T. Noguchi, Director of Transportation and his Assistant on the possible impact of the parking structure and the additional traffic generated and its effect on the Santa Clara County Bus Transportation System. Petitioner was advised that the County of Santa Clara was planning to route one of its bus lines up Sheridan. A check with James P. Lightbody a Senior Transportation Engineer of the County of Santa Clara stated there was no present plan to run any bus route on Sheridan Avenue in front of the building (see letter of August 6, 1976—Exhibit 33).

55.

After receipt of Glanville's letter of August 6, 1976 further conferences were then held by Petitioner and Roth with City Officials including Knox, Glanville, and Noguchi. At this time Glanville and Knox pointed out that they were not particularly pleased with the parking plans because of the high density and the lack of landscaping. Petitioner and Roth pointed out that these were preliminary plans and that landscaping would be added. Petitioner during this time was pursuing updated construction costs for the six-story addition from Johnson-Mape Construction Company and S & M Sprinkler.

56.

In view of the delay which had been encountered in connection with the zone change application, it was pointed out by Glanville to Petitioner that it would be very difficult to obtain the necessary approvals of the City of Palo Alto, because of the built-in delays for submissions and considerations by the various boards and bodies as for example, the Planning Commission, the Architectural Review Board and the City Council. Glanville advised Petitioner to immediately ask for an extension of time. Glanville, also

suggested that, since the City of Palo Alto did not wish to receive additional requests for extensions of time, the first extension of time be for a sufficient period of time so that additional extensions would not be required. For this reason, in a letter of August 11, 1976 (Exhibit 35) Petitioner requested a three year extension of time from October 31, 1976 in which to commence construction of floors 5 through 10 of the building at 260 Sheridan Avenue. It was pointed out that the extension of time was sought in order to permit the Petitioner to work out the necessary parking for the six-story addition. In that letter it was also pointed out that the original parking plans for the project had been emasculated by the County of Santa Clara when it acquired property which Petitioner had planned to use for the parking structure.

57.

Section 18.68.080 D of the Zoning Ordinance of the City of Palo Alto specifies that:

> "For good cause shown by the property owner in writing prior to the expiration of the original time schedule for the development the planning commission may, without a public hearing, recommend a change or extension of the time limits imposed by the development schedule. Upon receipt of the recommendation of the planning commission, the city council may change or extend the time limits imposed by the development schedule."

Glanville, the Zoning Administrator in his letter of August 20, 1976 (Exhibit 36), in reporting to the Planning Commission stated that the Petitioner needed more time to solve the parking problem and indicated that the staff knew that the Petitioner was attempting to do so. Even though an attempt was made to expedite the hearing on the three year extension, the Planning Commission did not take the matter up until August 25, 1976. On that date, the Planning

Commission considered the matter and denied the request (denied 4 to 2 with one abstention). (A copy of the minutes of this meeting are attached hereto as Exhibit 37.)

58.

The Planning Commission's refusal to grant Petitioner any extension of time on the development schedule was invalid, unlawful, unreasonable, malicious and void under CCP § 1094.5 because Petitioner met all statutory requirements for an extension. The conduct of the Planning Commisssion of the City of Palo Alto was an abuse of that discretion invested in them by Section 18.68.080 D of the Zoning Ordinance, because the Commission failed to exercise any discretion whatsoever, thereby depriving Petitioner of rights, privileges and immunities secured to it under the Constitution and Laws of the United States and the State of California.

59.

The decision of the Planning Commission of the City of Palo Alto to deny the request for the three year extension of time on the development schedule was based upon erronous conceptions and beliefs held by the Planning Commissioners such as that the County of Santa Clara "had developed numerous buildings in the area to house North County Agencies" when in fact the County has only used the existing Annual Reviews building with minor interior modifications and that the Sheridan and Grant Avenue areas had been essentially stagnant for the past ten years. One Commissioner considered the 50′ height limit, which was being enacted by the City on zones other than P-C, and many years after the project had been approved by both the Planning Commission and the City Council of the City of Palo Alto on numerous occasions. One Commissioner stated: "Rejection of the applicant's request would seem to be an extremely poisonous action because it would end the ultimate development of the property as planned

by the developers and as foreseen by the Commission and Council at the time it was originally proposed."

Several of the Planning Commissioners' comments that they believed the ten years provided by the P-C development schedule to start construction of the Phase 2 was extremely generous, failed to take into account that the length of the P-C was chosen expressly for the purpose of permitting the second phase to be delayed until there was a sufficient demand to utilize the additional office space which would be placed on the market by the six-story addition. The available office space in the City of Palo Alto began to be filled up in the first part of 1976 and a reasonably strong demand did not become apparent until the middle of 1976. Petitioner's request for an extension of time was therefore for good cause and should have been granted by the Planning Commission.

60.

Rather than take an automatic appeal to the City Council on the denial of the request for a three (3) year extension by the Planning Commission, Petitioner withdrew the request in order to consider the minimum time actually needed for Petitioner to start construction of the six-story addition, with the necessary parking, and what steps could be taken to expedite the same. Petitioner already had consulted other architects with respect to parking structures. Albert A. Hoover & Associates were selected and were instructed to proceed as rapidly as possible in preparing revised parking plans which could be submitted to the Planning Commission. Such parking plans were submitted in September, 1976. An application for a Use Permit (Exhibit 38) was filed on August 30, 1976 (see Exhibit 39). An application for a building permit (Exhibit 40) was filed on August 31, 1976 for the six-story addition on plans identical to that which had been previously submitted to the

City of Palo Alto and for which a building permit had previously been granted by the City of Palo Alto.

61.

Nowicki the Chief Building Inspector refused to perform the ministerial act of issuing a building permit on Petitioner's plans even though he had previously granted a building permit in 1970 on these same plans on the ground that to examine them would be a waste of time due to the fact that the plans had been prepared prior to the subsequently enacted 1973 building code. Petitioner is informed and believes and therefore alleges that Nowicki abused his discretion in refusing to issue a building permit, since the project had been designed and approved by the Planning Commission and the City Council of Palo Alto on numerous prior occasions. It thus constituted an existing structure designed in accordance with the 1961 Building Code, Phase 1 (see similar provisions in 1973 Uniform Building Code—Exhibit 40A) of which had been completed in 1967. Petitioner's ten-story office building as approved by the City of Palo Alto had an interior smoke tower and back-to-back stairs all of which were in compliance with the 1961 Building Code and thereafter approved by the City of Palo Alto.

62.

Petitioner, still believing that it would be possible to arrive at an amicable solution with the City of Palo Alto arranged to have its architect McAdam discuss the matter with Nowicki and Glanville who informed McAdam at that time that if any plans revised to meet the 1973 Building Code were submitted on behalf of the Petitioner for a building permit, that they would be submitted to ICBO of Whittier, California for the plan check.

63.

Petitioner is informed and believes and therefore alleges that Nowicki's plan to have ICBO make any plan check of Petitioner's revised plans for the addition was for the

express purpose of thwarting any possibility for Petitioner to obtain a building permit and to start construction of the six-story addition prior to October 31, 1976. This was confirmed by the fact that when Petitioner's architect McAdam called ICBO, he found that there would be approximately a six-week delay before a plan check could even be undertaken following submission to ICBO which would place Petitioner at or beyond the cut off date of October 31, 1976.

64.

Upon learning of the requirements of ICBO, Petitioner had to locate the structural firm which had done the structural calculation for the first four floors of the ten-story building in 1963 and for the six-story addition in 1968 and also had to locate the soil studies. Petitioner at this time also made a decision to submit a set of plans for plan check which met the 1973 building code. To this end, Petitioner contacted the structural engineers to obtain structural calculations and soil studies to ascertain whether the six-story addition met the 1973 earthquake requirements and the fire safety requirements. Another meeting was arranged with the City staff on September 21, 1976 in which for the City, Glanville, McLaughlin, Lacey, and Nowicki were present and for Petitioner its architect, its heating and ventilating and air conditioning engineer, its electrical and mechanical engineers to ascertain what specific requirements had to be met by the 1973 building code. The gist of the meeting was "no help" from the City of Palo Alto, which said it was Petitioner's problem to ascertain the requirements of the 1973 Building Code and to meet the same. After discovering this level of non-cooperation from the City of Palo Alto, Petitioner turned to the State of California and the next morning at 8:00 a.m. McAdam met with Anthony J. Ferrante, a Deputy State Fire Marshall of the State of California to ascertain whether or not back-to-back stairs with which the building

had been designed would be acceptable under the 1973 Building Code. Upon discussion with McLaughlin of the Fire Department it was determined that the Fire Department of the City of Palo Alto would approve back-to-back stairs if the building was fully sprinklered and was approved by the State Fire Marshall. On the following day, September 24, 1976 Petitioner and McAdam traveled to Sacramento and met with Hall and Pacchetti in the State Fire Marshall's office and reviewed with Pacchetti the back-to-back stairway construction as well as other fire code provisions and found that the building as constructed could be accepted under the 1973 Building Code (see letter September 27, 1976—Exhibit 41).

65.

Upon learning of this crucial decision from the State Fire Marshall, Petitioner instructed its architect, the heating, ventilating and air conditioning engineer, the structural engineers and the mechanical and electrical engineers to make the necessary design changes in the architectural drawings to bring the six-story addition into conformance with the 1973 Building Code. Since there had been many changes in the 1973 Building Code over the 1961 Building Code particularly in connection with fire safety, this represented an extensive effort on the part of these engineers representing design engineering expenditures in excess of $15,000.00 and proposed building cost increases in excess of $250,000.00.

66.

In view of the unwarranted requirements and delays which had been thrown at Petitioner by the City of Palo Alto, it became apparent that without some cooperation from the City of Palo Alto it would be impossible for Petitioner to obtain the necessary permits to start construction prior to October 31, 1976. It was therefore determined that it would be necessary to ask for a minimum

of a one (1) year extension of time. Again Petitioner attempted to expedite this request to ascertain whether or not such a request for a one (1) year extension could be heard by the Planning Commissioner in its meeting of September 25, 1976. Petitioner was informed that this was not possible because of the crowded agenda for the September 25, 1976 meeting and that the Planning Commission would refuse to take it up at any special meeting and that the first meeting at which it could be heard would be October 27, 1976, only a few days before the expiration date of October 31, 1976. In view of this fact, the one (1) year request for extension of time was filed by a letter (Exhibit 42) on October 1, 1976. In connection with this request for extension of time a very extensive letter of October 20, 1976 (Exhibit 43) was submitted to the Planning Commission outlining the need for such an extension.

67.

Petitioner traveled to ICBO at Whittier, California and met with Watson, Technical Director and Kayamatsu to ascertain if anything could be done to expedite a plan check to be submitted by the City of Palo Alto. Watson indicated that it took approximately six weeks before a plan check could be undertaken after received and that a plan check was taken up in the order received and would not be taken out of order unless there was a special request from the City of Palo Alto. However, in this case, even a special request from the City of Palo Alto would be of little help because the officials of ICBO would be attending their national convention in Iowa during the critical time when a plan check would be required.

68.

Petitioner caused to be filed a complete set of plans with the City of Palo Alto on October 15, 1976, which it believes meets the 1973 Building Code of the City of Palo Alto, along with the structural calculations for the first four

floors and basement as well as for the six upper floors together with a soils report (see letter of October 15, 1976 —Exhibit 44—and transmittal letter of October 15, 1976—Exhibit 45).

69.

Petitioner is informed and believes and therefore alleges that at the time of submission of the newly revised plans, Nowicki stated that a plan check of the submitted newly revised plans would be "a waste of time" and that "he wouldn't do anything until passed on by the City Council." Petitioner is informed and believes and therefore alleges that Nowicki had no intention of making any plan check on such plans and had no intention of issuing any building permit to Petitioner and thereby abused his discretion. Nowicki thereby forced Petitioner to seek an extension of time which he had reason to believe would be denied by the Planning Commission and the City Council of the City of Palo Alto, because of the changed political climate, thereby killing the addition of the six floors to the existing four-story building.

70.

In a telephone conference on October 21, 1976 Petitioner then explored with Nowicki whether he would issue an interim permit for the erection of steel for the six-story addition, because this could be readily accomplished by Petitioner with the structural steel already on hand. Petitioner was informed by Nowicki that there was "no chance of an interim permit for steel erection." Petitioner as a last resort then attempted to set up a meeting with George A. Sipel, the City Manager of the City of Palo Alto and Mr. Bernard Pawloski, Director of Public Works of the City of Palo Alto. Petitioner was unable to arrange a meeting with Sipel but was able to contact Pawloski by telephone who indicated that he would look into the matter and call Petitioner back.

71.

Petitioner in the meantime was also occupied with readying a presentation to the Planning Commission hearing for October 27, 1976 and coordinated with its attorney Klein and its architect McAdam for making presentations to the Planning Commission. Glanville prepared another letter dated October 22, 1976 (Exhibit 46) to the Planning Commission and attached an environmental impact assessment dated October 20, 1976 (Exhibit 47). The minutes of the Planning Commission meeting of October 27, 1976 are attached hereto as Exhibit 48. By a vote of 4 to 1 (one absent and one not participating), the Planning Commission recommended a denial of the application of the Petitioner for a one-year extension of the P-C District Development Schedule for the construction of floors five through ten on the building at 260 Sheridan Avenue.

72.

City Attorney Green at the Planning Commission hearing on October 27, 1976 stated that it was necessary for Petitioner to commence construction before October 31, 1976 to comply with the development schedule. Petitioner's attorney Klein pointed out to the Planning Commission that the City Hall staff was taking no action on the applications for a Use Permit and a Building Permit and thereby was precluding Petitioner from starting actual construction of the six-story addition prior to October 31, 1976 which would make it an all or nothing situation before the City Council when it took up the recommendation of the Planning Commission for the one (1) year extension.

73.

Throughout the proceedings before the City of Palo Alto, including the Planning Commission hearings on August 25, 1976, and October 27, 1976, the City Attorney's Office took the position that, before the project could proceed, an en-

vironmental impact study was required and that this was true even for the requested extension of time. For this reason, an environmental impact assessment was made by the City of Palo Alto on October 20, 1976 which, for obvious reasons of delay, recommended that a full environmental impact report be prepared before any approval was given by the Planning Commission. In this report it was pointed out that since the ten-story building had been approved, the "generally 50′ limit" had been established in Palo Alto. Petitioner is informed and believes and therefore alleges that this staff report so colored the opinions of the Planning Commissioners that it made it impossible for Petitioner to obtain a fair hearing on the request for an extension of time even though the City Attorney, Green, at the meeting stated that it "appears that more properly under the provisions of the California Environmental Quality Act the extension is not a change of the plan." The plan for the project itself was originally approved long prior to the effective date of November 23, 1970 of the California Environmental Quality Act was, and is therefore exempt (i.e. "grandfathered in") from the provisions of the act. Klein for Petitioner pointed out that the P-C in question had been passed on by the City Council more than ten years ago and was existing and valid and the only issue is whether or not Petitioner had shown good cause to obtain an extension.

74.

Klein pointed out that an investigation had been made into all the P-C files for the last fifteen years for which extensions of time had been requested and found that in all eleven cases in which extensions had been requested all eleven extensions were approved. Klein also pointed out that significant portions of the time in Petitioner's development schedule were lost by actions of the City of Palo Alto and Santa Clara County in regard to acquisition of Petitioner's land for the parking structure by the County of Santa Clara.

75.

The City Attorney's office through Assistant Attorney Green at the meeting also stated: "It is our opinion that factors relating to changed circumstances might be considered, such as height limitations, etc. The language of the ordinance is permissive rather than mandatory. Upon showing of good cause, an extension may be granted by the Commission indicating that it is exercising a discretion and, in exercising that discretion, it is our opinion that the Commission can take these various other factors into account." The City Attorney's arguments were effective because the Commissioners readily found changed circumstances, many of them in error in denying the application.

Commissioner Steinberg, for example, again stated that the County had developed numerous buildings in the area to house agencies which serves the North County. This is in error because the County has really used existing buildings on the property which it had acquired with only minor interior modifications. No new buildings have been developed in the area. Commissioner Steinberg also stated that the development had caused parking problems and overuse in the area, citing no basis. In fact the Grant and Sheridan Avenue areas have been virtually stagnant for the last ten years. The County of Santa Clara has a one-half block of land adjacent the North County Court House which has long been vacant. Commissioner Steinberg also stated that during a ten-year year period no construction had been commenced by Petitioner. This is also in error, because during the ten year period, construction of the four-story building was commenced in 1966 and completed in 1967, including expenditures of $450,000 in preparation for Phase 2 of the project.

Commissioner Renzel seemed preoccupied with the current parking for the building, which had nothing to do with the application for an extension, and Renzel also

failed to recognize that the City Council of Palo Alto had specifically provided that Petitioner need only provide 107 parking spaces and could utilize the land zoned R-3-P and HDA within 500′ of the existing four-story building for parking. Renzel also pointed out that the additional height would make the building imposing, obviously having in mind the 50′ height limitation, and pointed out that if the application came in today before the Planning Commission it would be denied almost automatically. Commissioner Green pointed out that a good faith effort had been made on the part of the developer and that it was proper and equitable that an extension of time be granted. The Planning Commission made its decision on the request for extension of time before it took up the proposed solution for the parking for the six-story addition. From the minutes, it is obvious that the Planning Commission had a closed mind on the extension and merely was interested in discussing the parking for the existing four-story building and not the parking for the six-story addition. Petitioner's parking plan was to continue the matter until December 15, 1976.

76

Respondent's denial of Petitioner's application for a one (1) year extension of time on the development schedule is invalid, unlawful, unreasonable, malicious and void under CCP Section 1085, and 1094.5 under Palo Alto Mun. Code, Section 186.080 D, which states for good cause shown by the property owner in writing prior to the expiration of the original time schedule, the Planning Commission may recommend an extension of the time limits imposed by the development schedule. Even though the Planning Commission may have discretion, the Planning Commission abused its discretion in denying Petitioner's application for a one year extension and particularly when it considered "alleged change circumstances". For these reasons Petitioner seeks a Writ Of Mandamus to compel the City of Palo Alto to

approve an extension of time in the development schedule. Petitioner believes that Respondents are incapable of exercising discretion in sufficiently dispassionate and objective manner so as to render a decision with respect to Petitioner's project which will be lawful and fair and that, unless this Court reviews the exercise of Respondents' discretion and corrects their abuse of discretion, Petitioner will be irreparably and perpetually damaged and otherwise prevented from exercising its lawful rights in regard to its real property.

77.

Petitioner at 8:45 a.m. on the morning following the Planning Commisssion meeting on the evening of October 27, 1976 talked to Pawloski and advised him of the adverse decision of the Planning Commission, of which he had already knowledge, and the need for an interim permit to permit erection of steel to commence actual construction prior to October 31, 1976. Arrangements had already been made with Mr. Arthur W. Alger, President of Peninsula Crane & Rigging of San Jose, California to start steel erection prior to October 31, 1976. Pawloski in the telephone conversation stated that he needed to obtain additional information from Nowicki and would call the Petitioner back. Pawloski at approximately 11:30 a.m. on that same morning said that he had been informed by Nowicki that the project was already dead and for that reason an interim permit could not be granted. Petitioner informed Pawloski that its belief was that the development schedule ran though October 31, 1976 and that an interim permit could be granted. Pawloski insisted the matter had to be taken up with Nowicki. Petitioner thereafter immediately called Nowicki, who again indicated his closed mind on the subject, and confirmed that in his opinion the project was dead because the October 1, 1976 deadline for the parking structure had passed. Petitioner informed Nowicki that this was the first it had heard of an October 1, 1976, deadline

and that in fact the deadline was October 31, 1976. Petitioner then arranged for a meeting at 1:30 p.m. in Nowicki's office with its attorney Klein to be present. Petitioner and attorney Klein appeared at Nowicki's office at 1:30 p.m. at which time Nowicki admitted that he was in error on the October 1, 1976 deadline but still refused to change his position with respect to an interim permit for erection of steel, thus foreclosing Petitioner's last opportunity to commence actual construction prior to October 31, 1976.

78.

Nowicki had the power to grant an interim building permit. Nowicki's argument that a building permit could not precede that of a use permit was without foundation because a use permit had been previously approved for the building. In fact in 1970 a building permit had preceded the issuance of a use permit. Nowicki's argument that he could not issue the building permit for the building because he had not received structural or architectural plans regarding the permanent parking structure was no reason for denying the interim building permit since a building permit had been granted for the same structure in 1970 without having received plans for a permanent parking structure. Nowicki knew or should have known that the taking of Petitioner's parking land by Santa Clara County precluded building of the permanent parking structure, which had been planned at the time of first City Council approval, and that surface off-street parking might take its place.

79.

Petitioner after having been turned down by the Planning Commission for the one-year extension and having exhausted every possibility of obtaining the necessary building permits and use permits from the City Staff of the City of Palo Alto which would have permitted the start of actual construction on Phase 2 prior to October 31, 1976 turned its attention to the City Council which would take up the denial by the Planning Commission. A detailed

letter dated November 9, 1976 (Exhibit 49) was addressed to the City Council. Individual letters were sent on October 22, 1976 to Nowicki (Exhibit 50), Glanville (Exhibit 51) and Booth (Exhibit 52) setting forth Petitioner's position. Nowicki's reply (Exhibit 53) was sent on November 12, 1976, Glanville's (Exhibit 54) on November 16, 1976. A staff report (Exhibit 58) dated November 18, 1976 was made to the City Council. A number of letters were submitted by third parties to the City Council requesting approval of the one year extension including one from the California Area Development Association (Exhibit 56) and one from Rocor International (Exhibit 57).

80.

The application of Petitioner for the P-C extension of one year was heard by the City Council on December 6, 1976. It failed with 2 in favor, 4 against, 1 abstaining and 2 absent. The City Council thereby adopted the recommendation of the Planning Commission. A review of the minutes of the City Council meeting of December 6, 1976 attached hereto as Exhibit 59 shows that the City Council and the Planning Commission believed that the Petitioner had demonstrated good faith but based their decision on other factors which City Attorney Booth had advised them they could do, as had the Planning Commission. Thus, the City Council was permitted by the City Attorney to consider such factors and the politically sensitive 50′ height issue, (see Exhibit 59A and comment to Palo Alto Times by Councilman Comstock) whether an environmental impact study should be made, whether there were present parking inadequacies and the like. City Attorney Booth stated that nothing could prohibit the City Council from applying a 50′ height limit or its environmental impact in considering whether or not the extension should be granted. One Councilman stated that one way to obtain an environmental impact report was to deny the time extension thereby making a new application necessary.

81.

On the day following the City Council meeting denying Petitioner's application for a one-year extension, Knox wrote a letter (Exhibit 57) dated December 7, 1976 to the Planning Commission pointing out that since the City Council failed to grant an extension of time of the P-C development schedule, he was directing the City staff to make a full environmental impact report for the project, and for that reason, the Planning Commission would not be able to consider the request of Petitioner "for a change of P-C plan and for change of district to P-C until such time as the environmental impact report has been prepared, commented upon by the public, and certified by the Planning Commission." Klein on behalf of Petitioner delivered a letter (Exhibit 61) dated December 13,1976 to the Planning Commission and asked in view of certain legal questions raised that Petitioner's change of P-C District Development Plan and the change of district of 204 Sheridan and 2660 Park Boulevard on the agenda for the meeting of December 15, 1976 be continued indefinitely. Glanville's letter (Exhibit 62) of December 17, 1976 point out that in accordance with Petitioner's request, the December 13, 1976 agenda items were continued indefinitely.

82.

Petitioner, after receiving a denial from the Planning Commission of its application for a three-year extension of time on the P-C Development Schedule and after filing a new application for only a one-year extension of time on October 1, 1976 authorized a search be undertaken to ascertain what treatment had been given by the City of Palo Alto to earlier applications for extensions of time in P/C developments. This search was to be undertaken by Dyanne Ladine of the firm of Spaeth, Blase, Valentine and Klein representing Petitioner. Ladine upon contacting Glanville, the Zoning Administrator, for such information

was advised that this task was of such a time consuming nature that approval of the City Manager was required even though she was willing to do the work. A letter (Exhibit 63) dated October 15, 1976 was sent to the City Manager requesting such permission which was subsequently received. Ladine undertook the study as set forth in the Ladine Declaration (Exhibit 64) and found that in all 10 cases located from 1961 to the present project the applicants had received approval of requests for extensions of time ranging from 25% to 200% of the originally allotted time under their development schedule.

83.

Petitioner in order to obtain an opinion as to whether Petitioner's building at 260 Sheridan with the proposed six-story addition could be considered to be an existing high-rise building under the Health and Safety Code of the State of California wrote a letter (Exhibit 65) of December 22, 1976 to Robert W. Hall, the Assistant State Marshall. Hall's letter (Exhibit 66) of January 4, 1977 gave the opinion that the building could be "considered to by an existing high-rise structure."

84.

Petitioner in searching for legal authorities for a fact situation which involved an office building to be built in two stages found the case of *Atkinson v. Piper* 195 N.W. 544 and submits herewith the Declaration of Harold C. Hohbach (Exhibit 64) showing the similarities between Petitioner's building and the Wisconsin Telephone Company building in that case.

85.

Respondents' refusals to approve an extension of time for Petitioner's P-C development schedule were unreasonable, unlawful, arbitrary, discriminatory, malicious and void, and constituted abuses of discretion, because Petitioner had shown good cause for the extensions of time,

because the development schedule was supposed to be linked to the demand for office space in the Palo Alto area, and because the City of Palo Alto and County of Santa Clara were themselves responsible for substantial delays in Petitioner's resumption of Phase 2 construction. Respondents' refusals were plainly not based upon the merits of the requests but upon Respondents' desire to revoke the approval given by previous City Councils and to impose upon Petitioner's project new, retroactive requirements, such as the 50′ height limitation, which would deprive Petitioner of its vested rights in the ten-story building previously approved.

86.

Respondents' refusals to approve an extension of time for Petitioner's P-C development schedule were a denial of due process of law, because both the Planning Commission and the City Council based the denials, not upon the appropriate standard of "good cause" shown by Petitioner, but upon a variety of extraneous and subjective factors, such as the "changed circumstances" suggested by the City Attorney and his assistant, the 50′ height limitation which could not legally be applied to petitioner's project, and, finally, upon miscellaneous personal opinions and misstatements of fact by the Planning Commissioners and City Council members.

87.

Respondents' refusals to approve an extension of time for Petitioner's P-C development schedule were a denial of equal protection of the laws, because in the past the City of Palo Alto had granted all other extensions requrestion [sic], and for reasons similar to those in Petitioner's request, which, if anything, was entitled to even greater consideration because of the County of Santa Clara's and the City of Palo Alto's roles in delaying the project, because of the magnitude of Petitioner's previous investment of time and

money, and because of vested rights Petitioner has to complete the project.

88.

Respondents' refusal to issue any use permits, building permits, or interim building permits, were invalid, unlawful, unreasonable, malicious, and void, and constituted abuses of discretion because Petitioner's plans, presented at the time of application for said use permits and building permits, were in conformity with the applicable Building Code and were submitted in accordance with a still-valid P-C development plan, thus entitling Petitioner to timely issuance of the permits.

89.

Respondents are estopped from adhering to a strict P-C development schedule for Petitioner, because Respondents themselves requested a delay in the construction of Petitioner's parking structure; the development schedule was supposed to have some flexibility in timing Respondent's own personnel indicated that it should be possible to obtain an extension of time in the development schedule, all of which Petitioner relied upon in good faith.

90,

Petitioner, because of the construction of Phase 1 of the office building which included the expenditure of much time, money and effort to accommodate Phase 2, and because of the expenditure of additional time, money and effort in the preparation of plans for Phase 2 and acquisition of the structural steel and elevators for Phase 2, obtained vested rights such that Petitioner cannot be deprived of the right to complete the project.

91.

Respondents, by their repeated actions and inactions, have displayed their hostility to the lawful exercise by

Petitioner of its vested rights to complete the ten-story building, and Petitioner therefore alleges that Respondents are incapable of exercising discretion in a sufficiently dispassionate and objective manner, so as to render a decision with respect to Petitioner's property which will be legal and fair. Unless this Court reviews the exercise of Respondents' discretion and corrects their abuse of discretion, Petitioner will be irreparably and perpetually damaged and prevented from exercising its lawful, vested rights with regard to its property and project.

92.

Petitioner has no plain, speedy and adequate remedy at law in that Respondents have denied Petitioner the lawful use of its real property, have taken the same without compensation, have acted without due process, and in contravention of the laws and the Constitution of the State of California and the United States of America, and contrary to the laws of the City of Palo Alto, and there is no remedy to review the exercise or abuse of said discretion other than by the relief herein requested.

93.

Petitioner has exhausted the available administrative remedies by filing applications for use permits and building permits, filing applications for extensions of time of the P-C development plan and pursuing them before the City Staff, the Planning Commission and the City Council of the City of Palo Alto, each of which have deferred to the inaction of the other. WHEREFORE, Petitioner prays for a Writ of Mandamus as follows:

1) That the Court find that Respondent abused its discretion in denying Petitioner an extension of the P-C development schedule, and command Respondent City of Palo Alto to grant Petitioner a three (3) year extension of time from the date of issuance of the Writ, in order for

Petitioner to commence actual construction of Phase 2 of the P-C development plan, including construction of the six-story addition and also provision of no more than 371 parking spaces, either by off-street surface parking or by one or more parking structures within 500 feet of the parcel on which the four-story building now stands.

2) That the Court find that Respondent abused its discretion in denying Petitioner the use permit and building permits required for the six-story addition, and command Respondent City of Palo Alto to issue such permits.

3) That the Court find that the ten-story building, with its six-story addition, shall be construed to be an existing building to be completed in accordance with the 1961 Building Code of the City of Palo Alto.

4) That the Court find that the ten-story building, with its six-story addition, shall be construed as an existing high rise structure under the State of California High Rise Regulations.

5) That the Court find that Petitioner, in specially constructing the first four stories to accommodate the six-story addition, by completing architectural plans for the six-story addition, and by obtaining the structural steel and elevators for the six-story addition, all prior to October 31, 1976, "commenced construction" and acquired vested rights to complete it.

6) That the Court find that the ten-story building with its associated parking is a single project to be built in two phases which was approved by the City of Palo Alto long prior to the effective date of November 23, 1970 of the California Environmental Quality Act of 1970 and is therefore exempt from any requirements of the Environmental Quality Act of 1970.

7) That the Court command the respondent City of Palo Alto to desist from requiring any environmental impact

study for the six-story addition to the building and also for any zone change application of Petitioner which is sought by Petitioner to meet the parking requirements of the City of Palo Alto for the ten-story building.

8) That the Court command the respondent City of Palo Alto to issue a Building Permit for the six-story addition with the requirements to be met to be no more stringent than that required by the 1961 Building Code of the City of Palo Alto.

9) A Writ of Mandamus issue commanding the Respondent City of Palo Alto to issue Use and Building Permits for construction of the necessary off-street parking or the parking structure or structures required to provide no more than 371 parking spaces with the requirement to be met for the parking structure or structures to be no more stringent than that requested by the 1961 Building Code of the City of Palo Alto.

10) That a Writ of Mandamus issue commanding the Respondent City of Palo Alto to desist from any further actions obstructing of interfering with Petitioner's vested right to complete the ten-story building, through the addition of six-stories and the necessary off-street parking or the parking structure or structures required to provide no more than the 371 parking spaces initially required by the City of Palo Alto.

11) Petitioner recover its costs and attorneys fees in this action.

COURT HOUSE PLAZA
COMPANY, Petitioner

Date: May 20, 1977

By Harold C. Hohbach
Harold C. Hohbach,
General Partner

Cartwright, Saroyan
& Sucherman, Inc.

Date: May 20, 1977

By Robert E. Cartwright
Robert E. Cartwright,
Esq.

Attorney for Petitioner

VERIFICATION

I, the undersigned, say:

I am the General Partner of the Petitioner in this action. I have read the above Petition for a Writ of ordinary Mandamus [C.C.P. 1094.5(a)] and administrative Mandamus [C.C.P. 1085] and know its contents, and the same is true of my own knowledge, except those matters which are stated in it on my information and belief, and as to those matters I believe it to be true.

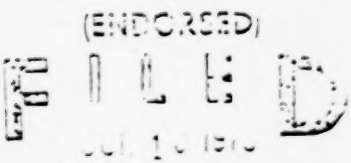
Executed on this 20th day of May, 1977 at Palo Alto, California.

I declare under penalty of perjury that the above is true and correct.

COURT HOUSE PLAZA
COMPANY,
Petitioner

By HAROLD C. HOHBACH
Harold C. Hohbach,
General Partner

Appendix B



COURT HOUSE PLAZA COMPANY,
a limited partnership,
Petitioner,

vs.

No. P 32449

THE CITY OF PALO ALTO, a municipal corporation, et al.,
Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A petition for writ of mandamus has been filed herein by Petitioner. Respondents filed a timely return and the matter came on regularly before this Court for trial on Feburary 21, 1978, and succeeding dates. The record of the administrative proceedings was received into evidence, examined and considered by the Court and additional evidence, both oral and documentary, was admitted, examined and considered by the Court. Trial briefs and post-trial briefs have been filed by both parties and examined and considered by the Court. Both parties have orally argued the matter to the Court on March 30, 1978.

Following its examination and consideration of all of the foregoing matters, the Court rendered and filed its Memo of Decision on May 11, 1978.

Petitioner thereafter filed its request for findings of fact and conclusions of law, and the Court filed its order directing Respondents to prepare proposed findings of fact and conclu-

sions of law and a proposed judgment.

The Court hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Petitioner, Courthouse Plaza Company, a limited partnership, was and is the owner of the four-story office building located at 260 Sheridan Avenue, Palo Alto, California. The four-story building is in a block bounded by Sheridan Avenue on the east, Birch Street on the south, Grant Avenue on the west and Park Boulevard on the north.

2. Respondent, City of Palo Alto ("City") is a municipal corporation and a charter city.

3. The City Council of City ("Council") passed Ordinance No. 2224 on December 28, 1964, rezoning the subject property to a "Planned Community" ("PC") zoning district.

4. Ordinance No. 2224 became effective on January 28, 1965.

5. Ordinance No. 2224 contains a Development Plan and Development Schedule providing for two phases of construction. Phase 1 provided for start of construction of a four-story office building and a parking garage within two years of Council approval. Phase 2 provided for a start of construction of six additional floors of the four-story office building and additional levels on the parking garage by October 31, 1976.

6. In August, 1965, City was informed that a part of the subject property planned by Petitioner for the permanent parking structure approved by Ordinance No. 2224 might be required by the County of Santa Clara ("County") for a County road project (Page Mill-Birch Street realignment). From 1961 on, the County wanted to undertake this project to improve traffic safety on the County Expressway System, of which the

Birch Street off-ramp (adjacent to the parking structure site) was a part. The County initiated, designed and constructed improvements for that project, including the Birch Street off-ramp, and condemned the land for the same. The County retained control of the project and there is no evidence that the City had any control over the project.County did not actually determine its condemnation take from the parking structure site until 1969. Accordingly, in an attempt to alleviate the problem caused by this uncertainty so as to allow Petitioner to proceed on a temporary basis, the Council passed Resolution No. 3860 on December 13, 1965, amending the Development Plan and Development Schedule of the PC zone established by Ordinance No. 2224. Resolution No. 3860 approved construction of Phase 1 with 107 temporary offstreet parking spaces in lieu of the required permanent parking structure and gave Petitioner an extension of time until December 13, 1968, to start construction of the parking structure.

7. City Zoning Ordinance §18.68.070(a) allows PC zoning districts to be amended by resolution rather than ordinance.

8. In October, 1965, the County asked the City to make no allowance for improvement of approximately 11,500 square feet of the subject property at the intersection of Grant Avenue and Birch Street (the "Grant-Birch" parcel). The County made this request, since it intended to condemn that part of the subject property for expansion of the North Santa Clara County Courthouse and did not wish to pay for improvements thereto. Petitioner withdrew this parcel from its original project proposal prior to passage of Ordinance No. 2224, at the urging of a private merchants' group, thus facilitating the Courthouse expansion. There is no evidence that the City was responsible for the acqusition of the Grant-Birch parcel.

9. In 1966, the County commenced condemnation proceedings for acquisition of the Grant-Birch parcel. In the Spring of

1967, following a jury trial, the County acquired this parcel and Petitioner received just compensation for the taking.

10. On January 17, 1966, City issued a use permit for the Phase 1 four-story building, promptly following passage of Resolution No. 3860.

11. On June 14, 1966, City issued a building permit for construction of a four-story office building as approved by Ordinance No. 2224 and Resoultion No. 3860 (Exhibit 10).

12. Prior to June 14, 1966, Petitioner's architect, Albert A. Hoover, raised the question with Petitioner about the additional expense to be incurred in designing and building the four-story office building to accommodate a six-story addition when the possibility existed that only the first four stories would ever be constructed and, therefore, such additional expenses could not be recovered. Petitioner was willing to assume the risk of incurring such expense.

13. The four-story building authorized by the June 14, 1966, building permit (Exhibit 10) was completed in August, 1977. It was substantially leased by the Spring of 1968. It is a self-contained, functional structure even without the additional six floors, and has been occupied and used up to and including the present.

14. On December 11, 1967, Council plassed Resolution No. 4055, amending the Development Plan and Development Schedule of the PC zone established by Ordinance No. 2224 and giving Petitioner an extension of time until December 13, 1969, to start construction of the parking structure.

15. Before February 15, 1968, and within six months after completion of the four-story building, Petitioner instructed its architect to proceed forthwith in preparing a complete set of working drawings for the six-story addition for Phase 2. The drawings were completed by the Fall of 1968.

16. As to the design of both Phase 1 and 2, the practice of Petitioner's architect was to apply changes in local and state laws, such as the Uniform Building Code, occurring after commencement of work on each of such phases.

17. Before the Phase 2 drawings were completed, the Council passed Resolution No. 4113 on May 6, 1968 (Exhibit 14) to further assist in the solution of the parking problem and to allow Petitioner to obtain permanent financing for Phase 2. This resolution amended the Development Plan and Development Schedule of the PC zone established by Ordinance No. 2224. It rescinded Resolutions Nos. 3860 and 4055. It also continued the prior authorization of 107 surface parking spaces in lieu of the permanent parking structure and permitted use and occupancy of the four-story building with such surface parking. It provided further that "construction of the permanent parking structure shall start on or before October 31,1976"—the same date provided in Ordinance No. 2224 for start of construction of the six-story addition. Finally, Resolution No. 4113 provided that the six-story addition "shall remain unused and unoccupied until the parking structure is completed." Except as herein indicated, Resolution No. 4113 left all other sections of Ordinance No. 2224 as originally written. Resolution No. 4113 has never been amended.

18. By Fall, 1968, Petitioner had obligated itself to its architect to pay for the complete Phase 2 working drawings.

19. In August, 1969, after finally determining the engineering design requirements, County commenced condemnation proceedings to acquire approximately 4,000 square feet of the permanent parking structure site between Page Mill Road and Sheridan Avenue for the County's Page Mill/Birch Street realignment ("parking site acquisition"). Prior to this date, Petitioner was free to apply to City for a building permit to build the parking structure approved by Ordinance No. 2224 and

Resolution No. 4113, but decided not to do so for reasons of its own.

20. In the Fall of 1969, Petitioner ordered the structural steel and elevators for Phase 2 and submitted the Phase 2 plans for bid. On September 30, 1969, Petitioner's then managing general partner (W. G. Dunn) instructed its general contractor to "immediately commence placement of all subcontracts for the construction of the six-story building addition" (Exhibit R40), including at least structural steel, steel decking, exterior facade and elevators.

21. By its letter of September 30, 1969 (Exhibit R40), and by the acts of its general contractor pursuant thereto in placing contracts for structural steel (Exhibit R66) and elevators (Exhibit R44), Petitioner fully obligated itslef to pay for Phase 2 development costs prior to obtain financing to construct Phase 2 and prior to being issued a building permit for Phase 2 on February 16, 1970 (almost five months later).

22. Petitioner admits that it committed a mistake by not obtaining financing before committing the partnership to the obligation involved in paying for the steel and elevators for Phase 2, and that this mistake got the partnership into financial difficulties. This mistake was in no way attributable to Respondent or any of its officials or employees.

23. Petitioner's inability to obtain Phase 2 financing was not due to any act or acts of Respondents. Despite continuing efforts throughout 1968 and 1969, Petitioner was unable to obtain anything other than a verbal agreement from a lender in late 1969 which ultimately failed to materialize because the lender found itself overcommitted during that same period of time. Similarly, in the Fall of 1976, Petitioner was unsuccessful in its one effort to obtain Phase 2 financing because the lender's agent stated that time was too short to permit any substantive negotiations prior to the Phase 2 deadline of October 31, 1976, for start of construction.

24. On November 7, 1969, Petitioner executed a real estate purchase contract with Power Construction, Inc. ("Power") under which Petitioner acquired the right to purchase several parcels of land in the block south of and adjacent to the subject property. Petitioner considered the Power parcels as a possible alternative to provide the necessary offstreet parking for the six-story addition. Petitioner never requested a zone change to use the Power percels for such parking despite its awareness of the pending County condemnation for the parking site acquisition, and despite its further awareness of City requirements in this regard by virtue of its zone change application for an amendment to the PC Development Schedule ultimately passed by the Council in Resolution No. 4113 (Exhibit 117). Mr. Power testified that the City never interfered with his contractual relations with Petitioner. Because of Petitioner's inability to obtain Phase 2 financing, the Power parcels were permitted to revert to Power late in 1971, and a quit-claim was executed by Petitioner in 1973.

25. Late in 1969, a controversy between Petitioner and City arose over the installation of a smokeproof tower. Earlier in 1965, City had resolved a similar dispute in Petitioner's favor within three weeks of the date it was raised by permitting construction of Phase 1 with an interior smokeproof tower. The 1969 controversy lasted about two months and was resolved in Petitioner's favor on February 2, 1970, by issuance of a building permit for Phase 2 using a mechanically-ventilated interior smoketower (Exhibits 17 & 19). An inter-office communication from the city attorney's office to the city manager (Exhibit 18) does not show that the City recognized that Petitioner has a vested right to *construct* Phase 2 but instead only a vested right to a *method* of construction, namely an interior smokeshaft in the existing four-story building. The refernece to vested rights in Exhibit 18 does not apply to construction of Phase 2.

26. On March 30, 1970, City issued Petitioner a use permit following an appeal from the City zoning administrator's refusal to issue the use permit on the ground that the proposed six-story addition would create a building approximately 14 feet (or 11 percent) higher than the building approved by the PC zoning in Ordinance No. 2224 and that the proposed addition was a variation not within reasonable limits of the zoning administrator's administrative discretion to approve. The use permit was granted within approximately six weeks after Petitioner applied for it.

27. On March 11, 1970, during a hearing on its appeal from the use permit denial, Petitioner told the City Planning Commission ("Commission") that it would not be building a parking structure, that it had options on sufficient land to provide the required Phase 2 parking, and that it realized it would have to provide parking before it could use and occupy the six-story addition (Exhibit 20, p. 83).

28. On March 30, 1970, at the hearing at which the Council approved the Phase 2 use permit, City advised Petitioner that the PC Development Plan required construction of the parking structure before October, 1976 (Exhibit 21, p. 238).

29. On April 3, 1970, the City staff advised Petitioner in writing that it should file plans in the near future for "consideration of a change of the approved Development Plan which now requires an off-street parking structure" (Exhibit 128).

30. On April 13, 1970, the Council amplified the minutes of its March 30, 1970, meeting to reflect that, as to Phase 2, the "parking requirements are expected to be consistent with the previously approved plan" approved by Ordinance 2224 (Exhibit 22).

31. City granted Petitioner's request of May 22, 1970, to extend the Phase 2 building permit to July 1, 1970 (Exhibit R4).

32. The Phase 2 building permit (Exhibit 19) expired on July 1, 1970, because of Petitioner's inability to obtain financing.

33. City granted Petitioner's request to extend the Phase 2 use permit to March 30, 1972.

34. The Phase 2 use permit expired on March 30, 1972, because of Petitioner's inability to obtain financing.

35. No construction work was ever undertaken on either the Phase 2 six-story additon or the permanent parking structure.

36. In August, 1970, the County of Santa Clara completed condemnation proceedings to acquire approximately 4,000 square feet of the permanent parking structure site between Page Mill Road and Sheridan Avenue for the County's Page Mill/Birch Street realignment. The County acquisition was based on a Stipulation for Judgment executed between Petitioner and County (Exhibit R5). County commenced this condemnation proceeding in August, 1969, approximately one month before Petitioner ordered the steel and elevators for Phase 2 (Exhibit R40). Petitioner received just compensation for this taking, including certain excess lands deeded to it by the County contiguous to the parking structure site.

37. On October 6, 1972, at Petitioner's request, City staff members met with Petitioner for the purpose of discussion construction requirements and processing of Phase 2. There was no intent to delay, hinder or thwart Petitioner in any way on the part of the City staff members present at the October 6, 1972, meeting, or on the part of any other City official, at that time or at any other time.

38. Approximately one year after the Phase 2 use permit expired (February 27, 1973), Petitioner applied for a new use permit for the Phase 2 six-story addition, but withdrew the application on March 20, 1973, without it being acted upon by the City. Petitioner intended to resubmit its application a few

months thereafter, but did not do so because it lost its chief tenant which decided to move to a new facility to achieve its own corporate identity. There was no evidence that the tenant vacated because of Petitioner's inability to provide more space for it in the contemplated six-story addition.

39. On September 24, 1973, the City passed Ordinance No. 2475 (Exhibit R8) placing a 50-foot height limit on buildings in certain zoning districts but not Planned Community zones, such as applies to the subject property.

40. The City passed various ordinances adopting current editions of various construction codes which were applicable to Phase 2. Among these were Ordinance No. 2436, passed on May 27, 1968, adopting the 1967 editions of the Uniform Building, Electrical, Mechanical and Plumbing Codes (Exhibit R3), Ordinance No. 2605, passed on June 7, 1971, adopting the 1970 editions of the Uniform Building and Mechanical Codes (Exhibit R6), and Ordinance No. 2809, passed on August 26, 1974, adopting the 1973 editions of the Uniform Building, Mechanical and Housing Codes.

41. For a period of approximately three years, from the date of its withdrawal of its Phase 2 use permit application on March 20, 1973, Petitioner did nothing about further construction on Phase 2 until June 30, 1976, when it applied for a zone change with respect to the parking problem and also for new uses not previously permitted (Exhibit 225). Despite being told by the City's zoning administrator on March 31,1975, that the City might agree to a reduction of parking spaces, Petitioner waited for more than a year to submit its zone change application. Petitioner did not start working in earnest on the parking problem until October or November, 1975.

42. Petitioner's zone change application of June 30, 1976, was defective in that it included a portion of property not owned by Petitioner and also a portion of the City street on

Sheridan Avenue. No City staff member told Petitioner that such an application would be approved either prior to or after its submittal.

43. Pursuant to §18.68.070(a) of the City Zoning Ordinance governing PC District Regulations, zone changes in a PC district are considered the same as changes in the City zoning map and are in accordance with the general rezoning procedures set forth in City Zoning Ordinance Chapter 18.98. Section 18.98.020 limits zone change applications to the Council or Commission or "a property owner." Section 18.98.030 permits zone change applications to include non-owned property only if it includes the written consent of the owner of record of legal title to make such application.

44. Petitioner's June 30, 1976, zone change application did not include the written consent of the owner of record of legal title to either the privately-owned property (Mrs. Pierson) or the City property in Sheridan Avenue.

45. Petitioner's June 30 zone change application did not request a hearing date before the Commission until August 25, 1976.

46. Almost nine years elapsed from the date Petitioner completed the four-story building on August 17, 1967, to August 11, 1976, when it submitted a request for a three-year extension of the Phase 2 deadline of October 31, 1976, contained in the PC Development Schedule in Ordinance No. 2224 and Resolution No. 4113.

47. On August 25, 1976, the Commission adopted a motion recommending to the Council that the three-year request be denied. This procedure followed the provisions of PC District Regulations set forth in Zoning Ordinance §18.68.080D. Following the Commission's recommendation of denial, Petitioner withdrew its three-year request and, instead, filed an application for a use permit for Phase 2 on August 30, 1976.

48. On August 31, 1976, Petitioner submitted an application for a building permit for the six-story addition based upon the building plans for which a permit had been issued in 1970. These plans had not been revised to meet current code requirements. The City, subsequent to the expiration of the 1970 building permit for the six-story addition, had adopted the 1970 and 1973 editions of the Uniform Building Code and other construction codes. The August 31, 1976, application for a building permit for Phase 2 did not comply with those codes.

49. The City building inspector refused to issue a building permit for the six-story addition on three grounds: (1) the plans submitted did not conform to then existing codes; (2) no use permit had been issued for the six-story addition as required by §18.68.040 of the PC District Regulations and (3) Petitioner's zone change application of June 30, 1976 (for parking and new uses) and August 11, 1976) for time extension) were then pending.

50. On September 8 and September 21, 1976, respectively, at Petitioner's request, City staff members met with Petitioner and its architect to discuss Phase 2. On September 8, 1976, City staff members advised Petitioner to resubmit revised building plans to conform to current codes. No revised plans were submitted until October 15, 1976, 16 days before the October 31, 1976, deadline for start of construction.

City staff members further advised Petitioner that City would submit the revised plans to the International Conference of Building Officials (ICBO) in Whittier, California, for plan check because (1) there were numerous building code changes that required extensive review, (2) the revisions were complex, and (3) under then existing time constraints the City building inspector could not undertake the review and approval.

51. On October 1, 1976, Petitioner filed a request with the Commission to amend the Development Schedule by requesting

a one-year extension for start of construction of the six-story addition.

52. On October 20, 1976, Petitioner submitted an extensive letter to the Commission in support of its one-year extension request.

53. On October 27, 1976, the Commission held a public hearing in which all relevant issues were discussed by Petitioner, its counsel, members of the public, the City staff and the Commission (Exhibit 48). At the conclusion of the hearing, the Commission passed a motion recommending to the Council that the one-year request be denied.

54. On October 28, 1976, the City building inspector denied Petitioner's request for an interim building permit on the grounds that no use permit had yet been issued for Phase 2 and that no plans for construction of a parking structure had been submitted.

55. On December 7, 1976, the Council held a public hearing on Petitioner's one-year request. The request for extension was submitted to lengthy debate in which all relevant issues were discussed and in which Petitioner and its counsel, members of the public, members of the City STaff and Council members fully participated. The Chairperson of the Planning Commission described the Commission's reasons for denying the extension. These were: the unresolved parking problem, the ten-year length of time for completing the development, the advantage over others in granting an extension, the changed conditions of the area and height limitations that could be considered. Council members discussed and considered such subjects as the impact of the County condemnation action on the parking requirements, the economics of the project, building height limits, environmental impact reports, delays in completing the project, the interests of the community, the general changes in the city's comprehensive plan. The pros and cons from public

participants discussed added jobs and taxes to be derived from the building's construction on the one hand to the need for an environmental report and general opposition to the building and its proposed height on the other.

56. The Council thoroughly considered Petitioner's request at its meeting. The discussions and deliberations were complete and unhurried. The factual data the Council had before it fairly represented both sides of the issues. Petitioner was asked on two separate occasions if it had been dealt with in good faith by City. Both times the answer was affirmative.

57. On December 7, 1976, the Council following the hearing and its deliberations, denied Petitioner's request for a one-year extension. Pursuant to PC District Regulations §18.68.070(a) and 18.68.080, the Development Schedule is part of the Development Plan which, in itself, is the PC zoning. Any request to change to the Development Schedule is a request for a rezoning or an amendment to the PC zoning as established by Ordinance No. 2224.

58. At the time the Council denied Petitioner's one-year request, no building permit had been issued for construction of the six-story addition or the parking structure. The previously issued building permit expired on July 1, 1970, and the use permit on March 30, 1972.

59. There was never any act or intent on the part of any of Respondents to obstruct, hinder or delay Petitioner.

60. There was no deliberate or willful attempt to delay, hinder or obstruct Petitioner in the completion of either Phase 1 or Phase 2.

61. Petitioner did not commence construction on Phase2by virtue of expending money to overbuild Phase 1 to accommodate it.

62. Respondents have acted conscientiously and in good

faith with Petitioner at all times.

63. None of Respondents' actions have been unreasonable, unlawful, arbitrary or discriminatory.

CONCLUSIONS OF LAW

From the foregoing findings of act, the Court makes the following conclusions of law:

1. Ordinance No. 2224 was a proper legilsative exercise of the police power through zoning. Zoning is not a contract.

2. Ordinance No. 2224 established a specially enacted zoning for the subject property which, from its effective date, prescribed a fixed, limited time period for start of construction for both Phase 1 and Phase 2.

3. There is nothing in Ordinance No. 2224, or law in general, which provided that the completion of Phase 1 guaranteed or vested any right to complete Phase 2.

4. The appropriate and applicable form of mandamus in this action is under California Code of Civil Procedure §1085. The City's actions in passing Ordinance No. 2224, Resolutions 3860 and 4055, and in considering Petitioner's requests for time extensions were legislative functions, not administrative orders or decisions which latter functions are reviewable under Code of Civil Procedure §1094.5.

5. The City Council in considering and deciding upon the request in this case to extend the ordinance was not acting in a quasi-judicial capacity but was performing a legislative function subject only to traditional mandamus review.

6. The decision regarding staff issuance of use permits under the City's PC zoning regulations is both ministerial in character and supplements the PC legislative process reviewable under Code of Civil Procedure §1085.

7. The decision whether or not to issue a building permit

involves a ministerial act reviewable under Code of Civil Procedure §1085.

8. The scope of review by the trial court in traditional mandamus actions (section 1085) requires only an examination into whether the action taken was arbitrary, capricious or entirely lacking in evidentiary support.

9. A city council in amending a zoning ordinance is not required to make express findings of fact as to the public purpose of the ordinance or its relation to the police power. Council members are not required to articulate for the record all of the reasons and motives behind their decisions.

10. No fundamental vested right was ever acquired by Petitioner. Absent such a right, the test of the City Council's action was whether there was substantial evidence to support it.

11. The action taken by the Council in denying the one-year request was supported by more than substantial evidence.

12. Petitioner did not acquire vested rights to construct Phase 2 by virtue of overbuilding Phase 1 to accommodate it or in any other respect.

13. Petitioner had not at any time acquired vested rights to a building permit to construct Phase 2; therefore, the Council's denial of the one-year extension did not constitute a deprivation of vested rights.

14. There is no basis for application of the doctrine of estoppel against Respondents.

15. None of Respondents' actions have been unreasonable, unlawful, arbitrary, discriminatory, malicious nor void, nor have such resulted in any denial of due process or equal protection of the laws.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 6, 1978.

JUDGE JOHN R. KENNEDY

Judge of the Superior Court

Appendix C

Robert E. Cartwright
Cartwright, Sucherman, Slobodin,
& Fowler, Inc.
160 Sansome Street, Suite 900
San Francisco, CA 94306
Telephone: (415) 433-0440

Jeffrey P. Widman
Andrew L. Faber
Berliner, Cohen & Biagini
99 Almaden Blvd., Suite 400
San Jose, CA 95113
Telephone: (408) 286-5800
Attorneys for Plaintiff

In the Superior Court of the State of California
in and for the County of Santa Clara

Civil No. P33070

Court House Plaza Company, a limited partnership,
Plaintiff,

v.

The City of Palo Alto, a municipal corporation, Stanley R. Norton, Byron D. Sher, Fred S. Eyerly, Roy L. Clay, Kirke W. Comstock, Scott T. Carey, John J. Berwald, Anne R. Witherspoon, John V. Bears, Councilmen, Peter R. Carpenter, Mary R. Gordon, William E. Green, Jay W. Mitchell, Emily M. Renzel, Anne Steinberg, Planning Commissioners, Stan J. Nowicki, Chief Building Inspector, James O. Glanville, Zoning Administrator, Napthali H. Knox, Director of Planning and Community Environment, Robert K. Booth, Jr., City Attorney and Louis B. Green, Assistant City Attorney,

Defendants.

Filed Feb. 26, 1982

FIRST AMENDED COMPLAINT FOR INVERSE CONDEMNATION, DEPRIVATION OF CONSTITUTIONAL RIGHTS, AND DECLARATORY RELIEF

Plaintiff alleges:

FIRST CAUSE OF ACTION

[Inverse Condemnation—United States Constitution]

[Parties to this Action]

1. Plaintiff, Court House Plaza Company, is a limited partnership formed and existing under the California Limited Partnership Act (Corporations Code §§ 15500 *et seq.*) Plaintiff does business under the name of Court House Plaza Company and has complied with the provisions of California law (Business and Professions Code §§ 17910 *et seq.*) for the filing and publication of a certificate stating such fictitious business name. Plaintiff is the successor-in-interest to California Lands Building Company, a California general partnership, the former owner of the property in question here until about October of 1971.

2. Plaintiff's principal place of business, and the property in question are located within, and the acts of Defendants described in this Complaint, all occurred within, the County of Santa Clara, California.

3. Plaintiff is the fee owner of real property located at 260 Sheridan Avenue, City of Palo Alto, County of Santa Clara, State of California.

4. Defendant, The City of Palo Alto ("the City"), is now, and at all times pertinent to this action was, a municipal corporation organized and existing under the laws of the State of California as a charter city and located in the County of Santa Clara, State of California.

5. Defendants Stanley R. Norton, Bryon D. Sher, Fred S. Eyerly, Roy L. Clay, Kirke W. Comstock, Scott T. Carey, John T. Berwald, Anne R. Witherspoon and John V. Beahrs were, on and before December 6, 1976, members of the City Council of the City.

Defendants Peter F. Carpenter, Mary Gordon, William E. Green, Jay W. Mitchell, Emily M. Renzel and Anne

Steinberg were, on and before December 6, 1976, members of the Planning Commission of the City.

Defendants Stanley J. Nowicki, James O. Glanville, Naphtali H. Knox, Robert K. Booth, Jr., and Louis B. Green were, on or before December 6, 1976, respectively, the Chief Building Inspector, the Zoning Administrator, the Director of Planning and Community Environment, the City Attorney, and the Assistant City Attorney of the City.

6. At all times pertinent to this action, Defendants, individually and collectively, acted in concert to cause Plaintiff's injury as described in this Complaint; and the individual Defendants served as the agents and/or employees of Defendant City and of each other and at all times acted within the scope of such agency and employment.

[History of the Project: Acquisition of Vested Rights]

7. The City adopted Ordinance No. 2224 on December 28, 1964 (the "P-C Ordinance"). The P-C Ordinance placed Plaintiff's property in a "P-C" zone; that is, a zone for professional and commercial office use. The P-C Ordinance also approved (by incorporation) Plaintiff's development plans for ten-story office building; and these plans consisted of detailed drawings showing the location, elevation, and floor plan of the building, the related parking garage, and other details of the site development (the "Project").

8. The P-C Ordinance contained certain conditions:

(a) "Building location, dimensions, heights and other improvements shall be substantially as indicated on the approved Development Plan."

(b) Off-street parking space shall be provided, the number of spaces to be at the ratio of one for each 144 square feet of floor area in the ground floors and one parking space for each 288 square feet of floor space in the upper floors.

(c) The ten-story building shall be built according to a development schedule providing that, in Phase 1, "start of construction of the four-story office building" and the "parking garage" shall be "within two years of Council approval" and, in Phase 2, "start of construction of the fifth to and including the tenth story" and "additional levels of the parking garage" shall be "by October 31, 1976."

The development schedule contained in the P-C Ordinance rested upon an understanding between Plaintiff and City officials that the phasing of the Project would enable Plaintiff to complete the Project when the demand for office space in the City made completion economically feasible.

9. Soon after adoption of the P-C Ordinance Plaintiff prepared architectural plans for the entire ten-story building. On June 14, 1966, the City issued a building permit for Phase 1. On January 17, 1966, the City issued a use permit for Phase 1. In reliance upon these permits and with the guidance of its architectural plans for the ten-story building, Plaintiff commenced construction of Phase 1, within the two-year period required under the development schedule of the P-C Ordinance, and completed construction in about August of 1967.

10. The first four stories of the building completed in Phase 1 incorporated structural elements designed to support the remaining six stories in Phase 2. Among these structural elements, costing over $450,000, were the following:

(a) A foundation capable in sustaining all ten floors;

(b) Structural steel of sufficient strength to support the remaining six floors;

(c) Heating and cooling equipment placed in the basement instead of upon the roof, in order to permit construction of the remaining six floors without interrupting service to the first four floors;

(d) Two additional elevator shafts to accommodate elevators for the remaining six floors;

(e) An interior smokeproof tower for fire safety purposes, not necessary in a four-story building;

(f) Extra electrical, water and sewage capacity permitting hook-up of facilities on the remaining six floors.

11. In so completing Phase 1 and thereby commencing actual construction of Phase 2, Plaintiff acquired a vested right to complete Phase 2 under regulations in effect on the date that the P-C Ordinance was adopted. Plaintiff reasonably expected that it might complete Phase 2 under such regulations based upon the conduct of Defendants in issuing building and use permits for comencement of the Project; and Plaintiff's investment in the Project in 1966 and succeeding years resulted from that reasonable expectation.

[The Parking Problem]

12. Because the parking garage contemplated by the P-C Ordinance would have interfered with the City's plan for realignment of Page Mill Road, the City did not require Plaintiff to begin construction of the garage within the two years provided in the development schedule. On December 13, 1965 the City adopted Resolution No. 3860 requiring Plaintiff to provide 107 off-street parking spaces instead of the garage. The City thereby acknowledged its responsibility for impeding Plaintiff's construction of the parking garage and indicated officially its willingness to cooperate with Plaintiff in resolving the parking problem.

13. Thereafter City engaged in a court of conduct which effectively aggravated the parking problem, prevented its resolution, and thwarted Plaintiff in its efforts to satisfy the condition of the P-C Ordinance regarding parking spaces. The City's course of conduct included, among others, the following acts:

(a) The City failed to resolve with the County of Santa Clara the design of the Page Mill Road realignment.

(b) On December 11, 1967, the City adopted Resolution No. 4055 extending time for the commencement of construction of the parking garage by one year. On May 6, 1968 the City adopted Resolution No. 4113, rescinding Resolution Nos. 3860 and 4055, substituting 107 attendant parking spaces on the surface in place of a parking garage, and allowing until October 31, 1976, for Plaintiff to commence construction of the parking garage.

(c) By agreement with the County of Santa Clara, the City consented to the County's acquiring, under a final order of condemnation entered on August 21, 1970, a portion of the land Plaintiff intended to use for construction of the parking garage, making its construction impossible.

(d) In connection with the foregoing condemnation, the City sold the County, and the County conveyed to Plaintiff as partial compensation, a small piece of land supposedly usable for the parking garage, but known to the City not to be usable under City's own requirements for design and construction.

(e) On March 31, 1975, the City resolved to acquire six parcels of land (the "Power parcels") for eventual development by the City for low- and moderate-income housing. At the time of this Resolution the City knew that Plaintiff had once invested funds in acquiring an option to purchase, and later in purchasing, the Power parcels as a means of resolving the parking problem. Although no longer the owner after 1973, Plaintiff remained interested in using the Power parcels for parking for the Project.

By these and other acts the City defeated Plaintiff's reasonable expectation that the City would with Plaintiff

cooperate to satisfy the parking requirements for the Project before October 31, 1976.

[City's Dilatory and Arbitrary Administrative Acts]

14. In the Fall of 1968 Plaintiff completed construction drawings for Phase 2. The demand for office space then justified completion of Phase 2. In October of 1969 Plaintiff arranged financing for construction, directed its general contractor to commence the placement of construction subcontracts for the remainder of Phase 2, and particularly for structural steel and elevators for the six-story addition.

15. Plaintiff applied for a building permit on December 1, 1969. Instead of issuing a building permit promptly according to the regulations fixed by the P-C Ordinance, Defendants arbitrarily insisted that the smokeproof tower shown in the construction plans did not comply with the City's Building Code as amended after the P-C Ordinance. This dispute between Plaintiff and Defendants was not resolved until after the Assistant City Attorney ruled that Plaintiff had acquired vested rights in a ten-story office building, to be completed with an interior smokeshaft and without a fire sprinkler system, under the P-C Ordinance. The City finally issued the building permit on February 16, 1970.

16. Plaintiff applied for a use permit on February 13, 1970. Again Defendants arbitrarily objected to this application on the ground that the ten-story building, when completed, would be fourteen feet higher than the building shown in the drawings incorporated into the P-C Ordinance, even though Defendants knew that the P-C Ordinance required building heights to be only "substantially as indicated on the approved Development Plan." The fourteen-foot height difference derived from the need for more space between the floors to accommodate heating and ventilation equipment. The first four floors built in Phase 1 had already included the extra spacing. Because

the City's Zoning Administrator objected to the difference in height, Plaintiff was required to request the City's Planning Commission to overrule the Zoning Administrator. On March 30, 1970 the City Council approved the Planning Commission's favorable ruling and issued the use permit, thereby ruling officially that the fourteen-foot height difference substantially complied with the P-C Ordinance.

17. While the City so delayed in issuing building and use permits to Plaintiff for the completion of Phase 2, the City also approved, on September 22, 1969, the nearby Palo Alto Square Project consisting of two ten-story office towers competing directly with Plaintiff's Project. The Palo Alto Square Project created a surplus of professional and commercial office space in the vicinity and so rendered the completion of Phase 2 by Plaintiff not viable economically for several years under then-prevailing business and financial conditions.

18. Notwithstanding its own financial difficulties and the saturated market for office space, Plaintiff again applied for a use permit to complete Phase 2, following the expiration of the use permit issued on February 13, 1970. Plaintiff's new application was filed on February 27, 1973 and requested a use permit identical to the one issued in 1970. Despite the fact that the City Council had already declared officially that the fourteen-foot height difference complied substantially with the P-C Ordinance, the City's Zoning Administrator indicated his intent to deny the new application because of that difference. In the face of this arbitrary objection, Plaintiff withdrew this application on March 30, 1973.

19. In September of 1973 the City adopted an interim Ordinance No. 2745 limiting the height of new structures to fifty feet. The City incorporated this fifty-foot height limit into its new comprehensive plan in 1976.

20. In late 1975 the market for professional and commercial office space finally improved. The competitive Palo Alto Square Project was then almost completely leased. The renewed demand for office space and the availability of construction financing combined to render the completion of Phase 2 of the Project economically feasible once again.

21. In September of 1975 Plaintiff renewed discussions with Defendants regarding the completion of Phase 2. In response, Defendants resumed a course of conduct intended to delay Plaintiff, prevent completion of Phase 2, deprive Plaintiff of its vested rights, and to frustrate Plaintiff's reasonable investment-backed expectation that it could compete the Project under the P-C Ordinance and the regulations in effect when the P-C Ordinance was adopted. Among the acts comprising such course of conduct were the following:

(a) After Plaintiff applied on June 30, 1976 for a change in the P-C zone to resolve the parking problem, the City's Zoning Administrator unreasonably objected to such application on the ground that it included land not owned by Plaintiff and for which Plaintiff requested contingent P-C zoning. Consequently, Plaintiff acquired the described land on September 11, 1976. Notwithstanding Plaintiff's expenditures of time, money, and personal efforts the zone-change application was never finally processed by the City before October 31, 1976, the end of the development schedule under the P-C Ordinance.

(b) In the face of objections to its zone-change application, Plaintiff applied for a three-year extension of the development schedule on the suggestion of the Zoning Administrator. The Planning Commission denied this extension on August 25, 1976, despite the fact that Section 18.68 of the City's Municipal Code provides that an extension of a development schedule may be recommended by

the Planning Commission "for good cause shown by the property owner in writing." Plaintiff appealed the denial to the City Council, and the Council placed the appeal on its agenda. On the advice by the Mayor of the City and other council-members that the appeal would prove too controversial, Plaintiff withdrew the appeal on September 11, 1976.

(c) On August 27, 1976 Plaintiff applied for another use permit for the same ten-story building for which the use permit had issued in 1970. On August 31, 1976 Plaintiff also applied for a building permit, submitting the same plans submitted to the City in 1969. The City's Zoning Administrator and Building Inspector refused to act on either of these applications, notwithstanding the fact that Plaintiff then possessed a right to obtain the use and building permits described in the applications pursuant to the P-C Ordinance.

(d) After Plaintiff requested on October 1, 1976 a one-year extension of the development schedule, Defendants again sought to impose upon Plaintiff's request regulations adopted after the P-C Ordinance, in particular the California Environmental Quality Act of 1973. On October 27, 1976 the Planning Commission denied the request for one-year extension and, at the same time, continued the still-pending zone-change application. Plaintiff appealed the denial of the extension of the City Council. On December 6, 1976 the City Council denied the appeal, thereby finally ruling that the development schedule ending on October 31, 1976 would not be extended.

(e) The City never issued another building or use permit for completion of Phase 2. The City, in failing to issue such permits, relied upon grounds not authorized by the P-C Ordinance but imposed by regulations adopted subsequently thereto.

22. Plaintiff demonstrated, as required by Section 18.68 of City's Municipal Code, "good cause" for the one-

year extension. Such good cause consisted in the history of the Project described above. As early as May 23, 1968, when the City Attorney wrote to Plaintiff concerning the availability of extensions to a development schedule, Plaintiff formed the reasonable expectation that, because the City had in fact customarily granted such extensions to other applicants, Plaintiff would also be granted an extension upon its request for good cause shown.

23. During the course of the history of the Project described above, Plaintiff invested these funds in the Phase 2 of the Project:

(a) $450,000 for the structural elements incorporated in Phase 1 as part of the construction of Phase 2.

(b) More than $65,000 for the preparation of architectural plans for the remaining six stories of the building.

(c) More than $450,000 for the fabrication of structural steel and elevators for the remaining six stories, expended in good faith reliance on the timely processing of Plaintiff's application for a building permit finally issued after delays on February 16, 1970.

(d) More than $20,000 for the preparation of revised plans and specifications to comply with the 1973 Uniform Building Code adopted in Palo Alto, in good-faith effort to compromise with the City, and an additional $5,000 or more in legal fees in connection with hearings before the Planning Commission and City Council.

(e) In excess of $10,000 for parking studies and revised parking plans submitted to the Planning Commission.

(f) $20,000 for the purchase of the six Power parcels to solve the parking needs for the ten-story building.

(g) $87,000 for acquisition of the Pierson parcel to overcome the City's objection to Plaintiff's zone-change application in September of 1976.

(h) In excess of $160,000 in total for parcels located at 228 Sheridan Avenue, 230 Sheridan Avenue, 320 Sheridan Avenue, and 2660 Park Boulevard, all near the Project, as possible sites for parking.

The above items constitute special damages suffered by Plaintiff as a result of Defendants' preventing completion of Phase 2. Plaintiff has also suffered additional special damages, the full nature and extent of which Plaintiff does not know, but will allege and prove at the appropriate time.

24. In addition, Plaintiff has suffered general damages in amounts not now known, including, but not limited to, the following:

(a) Loss of time by, and inconvenience to, its partners and the partners of its predecessor general partnership.

(b) Loss of profits from the existing four-story building.

(c) Loss of profits from the remaining six stories of the building which Plaintiff has a right to complete.

(d) Loss of increased appreciation in the four-story building and the remaining six stories together with the parking garage as a complete, integrated project.

Plaintiff has also suffered additional general damages, the full nature and extent of which Plaintiff does not know, but will allege and prove at the appropriate time.

25. By their conduct Defendants have appropriated, and taken without payment of just compensation, Plaintiff's property as described in paragraphs 23 and 24 preceding as well as the air-space above the existing four-story building, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

SECOND CAUSE OF ACTION

[Inverse Condemnation—California Constitution Art. 1, § 19]

26. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations contained in paragraphs 1 through 24, inclusive, of this Complaint.

27. By their conduct Defendants have confiscated, appropriated, and taken without payment of just compensation Plaintiff's property as described in paragraphs 23 and 24 above as well as the air-space above the existing four-story building; and such taking and/or damaging of property violates Article 1, § 19 of the Constitution of the State of California.

28. Plaintiff is entitled to recover its reasonable costs, disbursements, and expenses, including attorney's and expert fees, pursuant to Section 1036 of the California Code of Civil Procedure.

THIRD CAUSE OF ACTION

[Denial of Equal Protection and Due Process of Law Under the Fourteenth Amendment, U.S. Constitution]

29. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 24, inclusive, of this Complaint.

30. In denying Plaintiff an extension of the development schedule contained in the P-C Ordinance, while routinely granting extensions to other applicants upon a showing of good cause under Section 18.68 of the City's Municipal Code, Defendants have unlawfully discriminated against Plaintiff, thereby denying to Plaintiff equal protection under the laws and depriving Plaintiff of its rights to due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

31. In seeking to apply to the Project regulations adopted after the P-C Ordinance and after Plaintiff had acquired a vested right to complete Phase 2 under the P-C Ordinance and regulations in effect at the time of its adoption, Defendants have deprived Plaintiff of its right to substantive due process of law in violation of the Fourteenth and Fifth Amendments to the Constitution of the United States.

FOURTH CAUSE OF ACTION

[Denial of Equal Protection and Due Process of Law under Art. 1, § 7 of the California Constitution]

32. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 24, inclusive, of this Complaint.

33. In denying Plaintiff an extension of the development schedule contained in the P-C Ordinance, while routinely granting extensions to other property owners upon a showing of good cause under Section 18.68 of the City's Municipal Code, Defendants have unlawfully discriminated against Plaintiff, thereby denying Plaintiff equal protection under the laws and depriving Plaintiff of its right to due process of law in violation of Article 1, Section 7 of the Constitution of the State of California.

34. In seeking to apply requirements created by regulations adopted after the P-C Ordinance and after Plaintiff has acquired a vested right to complete Phase 2 under the P-C Ordinance and regulations in effect at the time of its adoption, Defendants have deprived Plaintiff of its right to substantive due process of law in violation of the Constitution of the State of California.

FIFTH CAUSE OF ACTION

[Deprivation of Constitutional Rights—Federal Civil Rights Act]

35. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 25 and paragraphs 29 through 31, inclusive, of this Complaint.

36. Through their conduct as described above, Defendants have, under color of state law and municipal ordinances and regulations, deprived Plaintiff of its rights, privileges, and immunities secured by the Constitution of the United States and, in particular, the Fifth and Fourteenth Amendments thereto, in violation of Sections 1981 and following of Title 42 of the United States Code.

37. For such violation Plaintiff is entitled to recover special and general damages as described in paragraphs 23 and 24 of the First Cause of Action.

38. As an alternative to such special and general damages, Plaintiff is entitled to equitable relief to restore the deprivation of its rights, privileges, and immunities by Defendants. Such equitable relief consists in a mandatory injunction from this Court directing Defendants to permit Plaintiff to complete Phase 2 of the Project under the P-C Ordinance and regulations in the effect at the time of its adoption, without further discretionary approvals by the City. In addition to such relief, Plaintiff is entitled to interim damages actually suffered during the period in which Defendants prevented Plaintiff from completing Phase 2; and Plaintiff asks leave to allege the amount of such damages and to prove the same when the amount becomes known.

SIXTH CAUSE OF ACTION

[Declaratory Relief]

39. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 38, inclusive, of this Complaint.

40. An actual controversy has arisen, now exists between the Plaintiff, on the one hand, and Defendants, on the other hand, concerning their respective rights and duties in connection with the Project. Plaintiff contends that it has the right either

(a) to complete Phase 2 under the P-C Ordinance and the regulations in effect at the time of its adoption without further discretionary approvals by the City and, in addition, to receive full compensation for actual damages suffered during the period in which the City prevented completion of Phase 2 or, in the alternative,

(b) to receive full compensation for all special and general damages heretofore suffered by Plaintiff as a result of Defendant's conduct described above.

41. Plaintiff is informed and believes, and alleges on the basis of such information and belief, that Defendants do not accept Plaintiff's contention but take a contrary position.

42. Plaintiff desires an immediate declaration of its rights in the Project. Such declaration is necessary and appropriate in order to resolve the controversy between Plaintiff and Defendants and to eliminate the injury previously suffered, and still being suffered, by Plaintiff so long as Defendants prevent Plaintiff from completing Phase 2 of the Project.

Wherefore Plaintiff prays for judgment against Defendants, and each of them, as follows:

1. For the special damages described in paragraph 23 above according to proof.

2. For the general damages described in paragraph 24 above according to proof.

3. A declaration of the respective rights, duties and obligations of the parties.

4. Plaintiff's reasonable attorneys' fees in this action.

5. Costs arising from the prosecution of this action.

6. Interest as provided by law and determined by this Court on all items of special and general damages requested in paragraphs 1 and 2 of this prayer.

7. For such other, further and additional relief as this Court may deem appropriate.

In the alternative, Plaintiff prays for judgment against Defendants, and each of them, as follows:

A. Equitable relief in the nature of a mandatory injunction allowing Plaintiff to complete Phase 2 of the Project under the P-C Ordinance and the regulations in effect at the time of its adoption without further discretionary approvals by City.

B. Interim damages in the amount to be proven at trial for losses, costs, and expenses incurred by Plaintiff during the period in which Defendants prevented the completion of Phase 2 of the Project.

C. Costs arising from the prosecution of this action.

D. Plaintiff's reasonable attorneys' fees in this action.

E. Interest as provided by law and determined by this Court on all of the losses, costs and expenses described in paragraph B of this alternative prayer.

F. For such other, further and additional relief as the Court may deem appropriate.

Dated: February 26, 1982.

BERLINER, COHEN & BIAGINI

By /s/ JEFFREY P. WIDMAN
Attorneys for Plaintiff

Appendix D

Ropers, Majeski, Kohn, Bentley, Wagner & Kane
A Professional Corporation
Crocker Plaza, Suite 820
84 West Santa Clara Street
San Jose, California 95113
(408) 287-6262
Attorneys for defendants The City of Palo Alto and each individually named defendant

In the Superior Court of the State of California
in and for the County of Santa Clara

Civil No. P33070

Court House Plaza Company, a limited partnership,
Plaintiff,

vs.

The City of Palo Alto, a municipal corporation, Stanley L. Norton, Byron D. Sher, Fred S. Eyerly, Roy L. Clay, Kirke W. Comstock, Scott T. Carey, John J. Berwald, Anne R. Witherspoon, John V. Bears, Councilmen, Peter R. Carpenter, Mary R. Gordon, William E. Green, Jay W. Mitchell, Emily M. Renzel, Anne Steinberg, Planning Commissioners, Stan J. Nowicki, Chief Building Inspector, James O. Glanville, Zoning Administrator, Napthali H. Knox, Director of Planning and Community Environment, Robert K. Booth, Jr., City Attorney and Louis G. Green, Assistant City Attorney,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRERS AND MOTION TO STRIKE

Date: Monday, April 26, 1982
Time: 9:30 a.m.
Dept: One
Est. Length of Hearing: 30 Mins.

MEMORANDUM OF POINTS AND AUTHORITIES

EXHIBITS

A. Claim against City of Palo Alto, March 3, 1977.

B. Complaint for Damages, filed September 22, 1977, Action Number P33070.

C. Petition for Writ of Mandamus, filed May 23, 1977, Action Number P32449.

D. Memo of Decision, Action Number P32449.

E. Findings of Fact and Conclusions of Law, Action Number P32449.

F. Judgment Denying Peremptory Writ of Mandate, Action Number P32449.

G. *Court House Plaza vs. City of Palo Alto* (1981) 117 C.A.3d 871.

H. Denial of Petition for Rehearing in Court of Appeals.

I. Denial of Hearing by California Supreme Court.

J. Notice of Appeal to U.S. Supreme Court.

K. Dismissal of Appeal and Denial of Certiorari by United States Supreme Court.

Appendix E

In the Superior Court of the State of California
in and for the County of Santa Clara

No. P 33070

Court House Plaza Company,
Plaintiff,

vs.

The City of Palo Alto,
Defendant.

MEMORANDUM OF DECISION AND ORDER AFTER HEARING ON MOTION TO STRIKE AND DEMURRER TO THE FIRST AMENDED COMPLAINT

[Filed June 17, 1982]

The plaintiff has notified the Court of a reservation of the claims arising under the United States Constitution and the Federal Civil Rights Act. This Court will therefore defer any adjudication with regard to the plaintiff's first, third, fourth and fifth causes of action pending outcome of Case No. C-81-4537-SZ currently filed in the United States District Court for the Northern District of California. Of necessity, the sixth cause of action requesting declaratory relief must await that litigation's outcome.

There remains only the plaintiff's second cause of action which is subject to the defendant's motions. The second cause of action basically seeks damages for inverse condemnation. The plaintiffs allege that they were prevented from constructing six additional floors to an existing four-story building because of a change in the zoning regulations by the City of Palo Alto.

The original plan for the buliding was a two-phase construction schedule and it is contended that the actions of the defendant City substantially deprived the plaintiff of full use of their property and that therefore the City should respond in damages under a theory of inverse condemnation.

Defendants have requested the Court to take judicial notice of the decisional law in *Court House Plaza vs. The City of Palo Alto* 117 CA3d 871 (1981) in which the Court held that plaintiff was not entitled to compensable damages under a theory of inverse condemnation. Such damages would include any that flow from interference with the use of air space.

Accordingly, the demurrer to the second cause of action is sustained on the grounds that that cause of action is barred by res judicata. Since there is no basis for an amendment, the demurrer is sustained without leave to amend.

Dated: June 17, 1982.

DAVID W. LEAHY
Judge of the Superior Court

Appendix F

Diane M. Lee
City Attorney
City of Palo Alto
250 Hamilton Avenue
Palo Alto, CA 94301
(415) 329-2171

Fred Caploe
A Professional Corporation
Williams & Caploe
1060 Grant Street, No. 201
P. O Box 698
Benicia, CA 94510
(415) 228-3840
(707) 746-1011

Superior Court of California,
County of Santa Clara

Civil No. P33070

Court House Plaza Company, a limited partnership,
Plaintiff,

vs.

The City of Palo Alto, a municipal corporation, Stanley R. Norton, Byron D. Sher, Fred S. Eyerly, Roy L. Clay, Kirke W. Comstock, Scott T. Carey, John J. Berwald, Anne R. Witherspoon, John V. Bears, Councilmen, Peter R. Carpenter, Mary R. Gordon, William E. Green, Jay W. Mitchell, Emily M. Renzel, Anne Steinberg, Planning Commissioners, Stan J. Nowicki, Chief Building Inspector, James O. Glanville, Zoning Administrator, Napthali H. Knox, Director of Planning and Community Environment, Robert K. Booth, Jr., City Attorney and Louis B. Green, Assistant City Attorney,
Defendants.

[Filed June 23, 1982]

JUDGMENT OF DISMISSAL

It Is Hereby Ordered, Adjudged and Decreed, that this action of Plaintiff be and the same hereby is, dismissed with prejudice against each and every Defendant; that Plaintiff herein is to take nothing by this action; and that Defendants herein are to recover from Plaintiff herein their costs of suit incurred herein.

Dated: June 23, 1982.

DAVID W. LEAHY
Judge of the Superior Court

Appendix G

Jeffrey P. Widman, Esquire
Sims & Widman
84 West Santa Clara Street
Suite 660
San Jose, California 95115
Telephone: (408) 998-3400
Attorney for Plaintiff

Superior Court of California
in and for the County of Santa Clara

Civil No. P 33070

Court House Plaza Company, a limited partnership,
Plaintiff,

vs.

The City of Palo Alto, a municipal corporation, et al.,
Defendants.

[Filed Aug. 16, 1982]

NOTICE OF APPEAL

To: The Clerk of the Superior Court

Plaintiff, Court House Plaza Company, A limited partnership appeals to the Court of Appeal of the State of California, First District, from the Judgment of Dismissal dated June 23, 1982.

Dated: August 16, 1982.

SIMS & WIDMAN
By /s/ JEFFREY P. WIDMAN
Attorney for Plaintiff

NO. 83-172

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

COURT HOUSE PLAZA COMPANY,

Petitioner,

v.

CITY OF PALO ALTO, ET AL.,

Respondents.

On Petition From The United States Court of Appeals
For The Ninth Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY P. WIDMAN
SIMS & WIDMAN
Crocker Plaza
Suite 660
84 W. Santa Clara
San Jose, California 95115
Tel.:(408) 998-3400

Attorneys for Plaintiff and Petitioner

October 1983

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Constitutions

Statutes

Petitioner Court House Plaza Company ("Petitioner") submits this reply to the Brief in Opposition to Writ of Certiorari[1] filed by Respondents City of Palo Alto, et al.

I. THE DOCTRINE OF *RES JUDICATA* AS APPLIED BY COURTS WOULD NOT BAR PETITIONER'S SUBSEQUENT ACTION *FOR DAMAGES*.

Respondents contend that California law on *res judicata* binds the federal courts in this action under 42 U.S.C. §1983 and that such law would bar Petitioner's action. Resp. B. 13-18. Without reiterating all the powerful reasons of policy against applying California law in this case, Petitioner will accept Respondents' premise, *arguendo*, and dispute their conclusion. California courts would *not* bar Petitioner's action for damages based upon constitutional violations under *res judicata* or any preclusion doctrine.

Respondents shore up their *res judicata* argument with detailed footnotes on California law. Resp. B. 16-18, notes 12, 13. Indeed, the Court may suspect that the difficult questions of law have been artfully buried alive in the notes and so left to pass quietly away.

Yet the California Supreme court speaks forcefully enough about the "primary rights" test for *res judicata* that represents California law. In *Agarwal v. Johnson*, 25 Cal.3d 932, 954, 603 P.2d 58, 72, 160 Cal.Rptr.141, 155 (1979), the court refused to rely solely upon commonality of historical facts:

> Under the 'primary rights' theory adhered to in California, it is true that there is only a single cause of action for the invasion of one primary right. [Citation omitted.] But the significant factor is the harm suffered; that the same facts are involved in both suits is not conclusive.

On its facts, *Agarwal* involved an employee who had prosecuted and lost a Title VII action in federal court before bringing a state-court action for defamation and infliction of emotional distress. Both actions sought damages. And both actions arose

[1] All references to the Brief in Opposition will be given in the form "Resp. B." followed immediately by page number.

from the same historical event. Nevertheless, the California Supreme Court held that the subsequent state action involved a separate cause of action and therefore *res judicata* would not apply.

The result should be no different under California law where the statutory cause of action for damages Title VII in *Agarwal*, § 1983 here – follows the state-court action.

Respondents attempt to distinguish *Agarwal* by suggesting that there the first action (under Title VII) involved "property rights," while the second (defamation) involved "personal rights." Resp. B. 15-16, note 11. This distinction is forced. A man's loss of his job is as much a personal injury as a loss of property; one could say much the same about a loss of a man's good name. *Agarwal* simply makes this case appear a less likely candidate for dismissal on *res judicata* grounds. For here Petitioner has never prosecuted to judgment any other action for damages.

In a more recent application of the "primary right" test in the California courts, *Sawyer v. First City Financial Corporation, Ltd.*, 124 Cal.App.3d 390, 177 Cal.Rptr. 398 (1981), the court held that a prior action for breach of contract (collection of a promissory note) did not bar a subsequent action under a variety of tort theories that also sought collection on the note. Initially, *Sawyer* recited the relevant California procedural rule:

> Where the plaintiff has several causes of action, however, even though they may arise from the same factual setting, and even though they might have been joined in one suit under permissive joinder provisions, the plaintiff is privileged to bring separate actions based upon each separate cause.

Id., at 399-400, 171 Cal.Rptr. at 402. Advocating a flexible and discriminating application of *res judicata*, the *Sawyer* court acknowledged,:

> The theoretical discussion of what constitutes a 'primary right' is complicated by historical precedent in several well-litigated areas establishing the question of 'primary

> right' in a manner perhaps contrary to the result that might be reached by a purely logical approach.

Id., at 400, 177 Cal.Rptr. 403.

There is nothing surprising about the flexibility with which the California courts apply the "primary rights" test. In fact, the doctrine of *res judicata* itself arises from equitable considerations. See *Jackson v. Jackson*, 253 Cal.App.2d 1026, 62 Cal.Rptr. 121, 129-30 (1967) and authorities cited therein. Equitable considerations never disappear from the judicial act of interpreting and applying *res judicata*.

II. WHAT RESPONDENTS LABEL "CHP III" IS A CALIFORNIA ACTION FOR DAMAGES IN WHICH AN APPEAL REMAINS PENDING, NOT A FINAL OR *AUTHORITATIVE RULING BY THE CALIFORNIA COURTS*.

Respondents attempt to give the impression that Petitioner has litigated every issue at least three times. Dignifying their argument with Roman numerals, Respondents describe "CHP III" as a state-court adjudication on *res judicata*. Resp. B. 8-9, 19.

Upon examination, it turns out that "CHP III" is a California trial court's order of dismissal of *state constitutional* claims only. Moreover, the dismissal is not a final judgment because it remains on appeal. See Resp. B., Appendix G, p. A-92. Finally, "CHP III" was originally filed on September 22, 1977, a few months after the Mandamus, but never prosecuted to trial because the California courts strongly favored initial resort to equitable remedies. See Petition for Certiorari, Argument III.

III. THE DECISION IN THE MANDAMUS DID NOT ADJUDICATE PETITIONER'S *FEDERAL CONSTITUTIONAL RIGHTS*.

Respondents repeatedly translate "vested right," as used by the California courts in determining the proper standard of judicial review in mandamus proceedings, into federal constitutional rights embraced in section 1983. But this facile interchange of terms should not mislead the Court. What was actually litigated in the Mandamus ("CHP I") were only the

limited questions of the scope of judicial review of the City's administrative decision and Petitioner's right to receive a writ to compel issuance of permits by the City.

The Memo of Decision by the trial judge in the Mandamus discusses "vested rights" in that context only. See Appendix to Jurisdictional Statement in U.S. Docket No. 81-404, *cert. denied*, 454 U.S. 1074 (1981), at pp. A-1 ff. The Memo simply does not address constitutional rights. The subsequently entered conclusions of law contain catch-all references to "due process" and "equal protection." *Id.* at pp. A-19 ff. But again there is no reference to any provision of the California or United States Constitution. Accordingly, any such reference in the appellate opinion in the Mandamus can only be regarded as dictum, completely gratuitous and unnecessary to the court's decision. *Cf.* Resp. B.3.

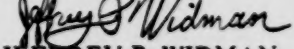
IV. CONCLUSION

Respondents have not overcome the powerful reasons of federal policy and fundamental fairness that find expression in the Petition for Certiorari. The Petition should be granted.

Dated: October 24, 1983

Respectfully submitted,

SIMS & WIDMAN



JEFFREY P. WIDMAN

Attorneys for Petitioner

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

Jeffrey P. Widman, being first duly sworn upon his oath deposes and says that he is a member of the Bar of this Court and one of the counsel of record for Petitioner in this cause; that on the 24th day of October 1983, he mailed three copies of Petitioner's Reply to Respondents' Brief in Opposition to Petition for Writ of Certorari in this cause by depositing same in the United States mail, first-class postage prepaid, to:

Diane M. Lee
City Attorney
City of Palo Alto
250 Hamilton Ave.
Palo Alto, CA 94301

Fred Caploe
Williams & Caploe
1060 Grant St., Suite 201
P.O. Box 698
Benicia, CA 94510

and that he also mailed forty copies of Petitioner's Reply to Respondents' Brief in Opposition to Petition For Writ of Certorari to the Clerk of This Court, first-class postage prepaid, all in compliance with Supreme Court Rule 28.

Jeffrey P. Widman
JEFFREY P. WIDMAN

SUBSCRIBED AND SWORN to before me this 24th day of October, 1983.

Witness my hand and official seal.

OFFICIAL SEAL
A. B. DREXLER
NOTARY PUBLIC — CALIFORNIA
COUNTY OF SANTA CLARA
Comm. Exp. July 15, 1986

A.B. DREXLER
NOTARY PUBLIC

My commission expires 7-15-86